Supreme Court, U.S.
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In The

Supreme Court of the United States

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7,

Conditional Cross-Petitioner,

v.

TOWN OF MULDROW, et al.,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Tenth Circuit render a decision inconsistent with Federal Law by determining that when a water district purchases its own loans under the Agricultural Credit Act of 1987 it forfeits its 7 U.S.C. § 1926(b) protection.

2. Did the Tenth Circuit render a decision inconsistent with Federal Law by rejecting the Bright Line Rule for the purposes of 7 U.S.C. § 1926(b) for those water districts which have defined geographical boundaries under state law.

PARTIES TO THE PROCEEDING

Cross-Petitioners

Sequoyah County Rural Water District No. 7, referenced herein as "Sequoyah-7", is an agency and legally constituted authority of the state of Oklahoma (82 Oklahoma Statutes § 1324.6), created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District (Title 82 Oklahoma Statutes § 1324.3).

Cross-Respondents

Town of Muldrow and the Muldrow Public Works Authority. The Muldrow Public Works Authority is a public trust, of which the Town of Muldrow is the sole beneficiary. Generally speaking, singular references to "Town of Muldrow," and "Muldrow" are intended to encompass both Cross-Respondents.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 191 F.3d 1192 (10th Cir. 1999). A copy of the Opinion is included in Muldrow's Petition For Certiorari (hereinafter "Petition For Cert.") Appendix A, at page 1a. The Court of Appeals' order denying rehearing is unpublished, but is included in Petition For Cert. Appendix D., at page 55a. The Order and Judgment by the United States District Court for the Eastern District of Oklahoma are unpublished, but are included in Petition For Cert. Appendix B, at page 33a, and in Appendix C, at page 53a, respectively.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Opinion on August 17, 1999. [Petition For Cert. Appendix A.] On August 31, 1999, Muldrow filed a timely Combined Petition for Rehearing and Petition for Rehearing *En Banc* ("Combined Petition"). The United States Court of Appeals for the Tenth Circuit denied the Combined Petition on September 28, 1999. [Petition For Cert. Appendix D.] Muldrow filed a Petition for Writ of Certiorari within 90 days of the denial of the Combined Petition. The Court's jurisdiction is sought under 28 U.S.C. §§ 1254(1), 2101(c), and 2106. This Conditional Cross-Petition For Writ of Certiorari is filed within 30 days after the Petition For Writ of Certiorari was placed on the docket.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 1926: Water and waste facility loans and grants.[1]

> (b) Curtailment of limitation of service prohibited
>
> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1929a, Other Provisions:

> Sale of rural development notes. Act Oct. 21, 1986, P.L. 99-509, Title I, Subtitle A, § 1001(a), (c)-(e), 100 Stat. 1874; § 1001(f) and (g), as added Jan. 6, 1988, P.L. 100-233, Title VIII, § 803, 101 Stat. 1714; § 1001(h) as added Dec. 12, 1989, P.L. 101-220, § 12, 103 Stat. 1883, provides:
>
> > "(a) Sales required. The Secretary of Agriculture, under such terms as the Secretary may prescribe, shall sell notes and other obligations held in the Rural Development Insurance Fund established under section

---

[1] The full text of 7 U.S.C. § 1926 is set forth in Petitioners' Appendix E.

309A of the Consolidated Farm and Rural Development Act [this section] in such amounts as to realize net proceeds to the Government of not less than –

(1) $1,000,000,000 from such sales during fiscal year 1987,

(2) $552,000,000 from such sales during fiscal year 1988, and

(3) $547,000,000 from such sales during fiscal year 1989.

"(c) Contract provisions. Consistent with section 309A(e) of the Consolidated Farm and Rural Development Act [this section], as amended by subsection (b), any sale of notes or other obligations, as described in subsection (a), shall not alter the terms specified in the note or other obligation, except that, on sale, a note or other obligation shall not be subject to the provisions of section 333(c) of the Consolidated Farm and Rural Development Act [7 U.S.C. § 1983(c)].

"(d) Eligibility to purchase notes. Notwithstanding any other provision of law, each institution of the Farm Credit System shall be eligible to purchase notes and other obligations held in the Rural Development Insurance Fund and to service (including the extension of additional credit and all other actions necessary to preserve, conserve, or protect the institution's interest in the purchased notes or other obligations), collect, and dispose of such notes and other obligations, subject only to such terms and

conditions as may be agreed to by the Secretary of Agriculture and the purchasing institution and as may be approved by the Farm Credit Administration.

"(e) Loan servicing. Prior to selling any note or other obligation, as described in subsection (a), the Secretary of Agriculture shall require persons offering to purchase the note or other obligation to demonstrate –

> "(1) an ability or resources to provide such servicing, with respect to the loans represented by the note or other obligation, that the Secretary deems necessary to ensure the continued performance on the loan; and
>
> "(2) the ability to generate capital to provide the borrowers of the loans such additional credit as may be necessary in proper servicing of the loans.

"(f) Right of first refusal. (1) In general. Before conducting a sale of a portfolio of notes or other obligations under this section, the Secretary of Agriculture shall –

> "(A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and
>
> "(B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a price to be determined under paragraph (2).
>
> "(2) Determination of offering price. (A) Authority. The Secretary of Agriculture shall determine, in accordance with

subparagraph (B), the price at which a note or other obligation shall be offered for sale under this subsection.

"(B) Price. Such price shall be determined by discontinuing the payment stream of such note or other obligation at the yield on the then most recent sale of the portfolio, adjusted for changes in market interest rates, servicing and sales expenses, and the maturity and interest rate of such note.

"(3) Prohibitions. (A) Purchase of obligation not tied to purchase of other obligations. The Secretary of Agriculture shall not require the issuer of any unsold note or other obligation to be offered for sale under this subsection to purchase any other such note or other obligation as a condition of the sale of any such note or other obligation to the issuer.

"(B) Offer to be made without regard to financing. The Secretary shall offer notes or other obligations for sale to the issuers thereof under this subsection without regard to the manner in which such issuers intend to finance the purchase of such notes or other obligations. However, the price of sale to any issuer using tax exempt financing shall be determined using a yield reflective of the Schedule of

Certified Interest Rates as published monthly by the Secretary of the Treasury.

"(g) Applicability of prohibition on curtailment or limitation of service. Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section.

"(h)(1) Notwithstanding the provisions of section 633 of the Rural Development, Agriculture, and Related Agencies Appropriations Act, 1989 (Public Law 100-460) [unclassified], the Secretary of Agriculture shall offer to the issuer of any unsold note or other obligation described in paragraph (2)(A) for which such issuer made the good faith deposit described in paragraph (2)(A) the opportunity to purchase such note or other obligation consistent with the provisions of this subsection and subsections (f)(2) and (f)(3).

"(2) The provisions of this subsection shall apply only to those issuers who:

"(A) on or before March 9, 1989, made a good faith deposit under this section for fiscal year 1989 with the Secretary to purchase a note or other obligation held in the Rural Development Insurance Fund; and

"(B) otherwise meet all eligibility criteria, as such criteria existed immediately prior to May 9, 1989, at the time the purchase occurs under this subsection.

> "(3) The opportunity to purchase any such note or other obligation shall be held open, under the policies and procedures in effect under subsections (f)(2) and (f)(3) immediately prior to May 9, 1989, for 150 days after the date of enactment of this subsection. The Secretary shall not require any further good faith deposit from issuers who qualify under this subsection. The Secretary shall notify eligible issuers of the opportunity afforded under this subsection within 30 days after the date of enactment of this subsection and may require such issuers to express an intention to purchase their note or other obligation by a date certain.".

7 C.F.R. § 1942.17(b)(2):

(2) Facility. (i) Facilities must be located in rural areas, except for utility type services such as water, sewer, natural gas, or hydroelectric, serving both rural and non-rural areas. In such cases, FmHA or its successor agency under Public Law 103-354 funds may be used to finance only that portion serving rural areas, regardless of facility location.

> (ii) Essential community facilities must primarily serve rural areas.
>
> (iii) For water or waste disposal facilities, the terms "rural" and "rural area" will not include any area in any city or town with a population in excess of 10,000 inhabitants, according to the latest decennial Census of the United States.
>
> (iv) For essential community facilities, the terms "rural" and "rural area" will not include any

area in any city or town with a population in excess of 20,000 inhabitants, according to the latest decennial Census of the United States.

7 C.F.R. § 1942.17(e)(1):

(e) Facilities for public use. All facilities financed under the provisions of this subpart shall be for public use.

(1) Utility-type service facilities will be installed so as to serve any user within the service area who desires service and can be feasibly and legally served. Applicants and borrowers must obtain written concurrence of the FmHA or its successor agency under Public Law 103-354 prior to refusing service to such user. Upon failure to provide service which is reasonable and legal, such user shall have direct right of action against the applicant/borrower. A notice of the availability of this service should be given by the applicant/borrower to all persons living within the area who can feasibly and legally be served by the phase of the project being financed.

7 C.F.R. § 1942.17(n)(2)(vii):

(2) Loan resolutions. Loan resolutions will be adopted by both public and other-than-public bodies using Form FmHA or its successor agency under Public Law 103-354-1942-47, "Loan Resolution (Public Bodies)," or Form FmHA or its successor agency under Public Law 103-354 1942-9, "Loan Resolution (Security Agreement)." These resolutions supplement other provisions in this subpart. The applicant will agree:

* * *

(vii) To provide adequate service to all persons within the service area who can feasibly and legally be served and to obtain FmHA or its successor agency under Public Law 103-354s concurrence prior to refusing new or adequate services to such persons. Upon failure of the applicant to provide services which are feasible and legal, such person shall have a direct right of action against the applicant organization.

STATEMENT OF THE CASE

Sequoyah-7 is an Oklahoma Rural Water District which is now, and has been at various times in the past, indebted to the Federal Government for loans obtained to develop its water distribution system. Sequoyah-7 brought this action seeking to enjoin Muldrow from selling water within its service area, and to recover damages for past water sales in violation of Title 7 U.S.C. § 1926(b).

Title 7 U.S.C. § 1926(b) [hereafter § 1926(b)], states that water service provided or made available through an indebted water district may not be curtailed or limited by a municipality or other public body. As interpreted by the Courts, this provision prohibits a municipality or other public body from selling water within the water district's service area during the period of its indebtedness.

Over the years Sequoyah-7 and its predecessors have received four federal loans. The original loans were taken out on April 14, 1969 and remained in place until *purchased* by Sequoyah-7 pursuant to the Agricultural Credit

Act of 1987, on May 5, 1989. On September 28, 1994, Sequoyah-7 obtained a Fourth Loan, on which it remains indebted today.

On June 12, 1998, the District Court granted summary judgment based on a finding that Sequoyah-7 had not made service available to the customers in dispute. A decision which was in error and has been reversed by the Tenth Circuit.

On June 12, 1998, the District Court granted summary judgment for Muldrow finding in pertinent part:

a. That the purchase of its own loans by Sequoyah-7 on May 5, 1989, extinguished its § 1926(b) protection until it obtained its next FmHA[2] loan on September 28, 1994.

b. That Sequoyah-7 had not made service available to the customers in dispute, rejecting the "Bright Line Rule", and adapting a "Pipes in The Ground Test".

Sequoyah-7 made a timely appeal to the 10th Circuit which held in pertinent part:

a. That the purchase of its own loans by Sequoyah-7 on May 5, 1989, extinguished Sequoyah-7's § 1926(b) protection until it obtained its next FmHA loan on September 28, 1994.

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[2] Although the Farmers Home Administration (FmHA) is now known as the Rural Economic and Community Development Service, for the sake of simplicity, this Brief will refer only to the "FmHA".

b. That although Sequoyah-7 does have a legal obligation to provide service under the Federal Regulations, such legal obligation is not the legal equivalent of making service available for the purpose of § 1926(b).

c. That applying the "Pipes In The Ground Test", there is a question of fact concerning whether Sequoyah-7 has made service available, and reversing and remanding the case to the Trial Court on this issue.

ARGUMENT ONE: THE TENTH CIRCUIT'S DETERMINATION THAT SEQUOYAH-7'S PURCHASE OF ITS OWN LOANS PURSUANT TO THE AGRICULTURE CREDIT ACT OF 1987 EXTINGUISHED SEQUOYAH-7'S § 1926(b) PROTECTION IS INCONSISTENT WITH FEDERAL LAW

Sequoyah-7 originally borrowed funds and became indebted to the FmHA in 1969. Sequoyah-7 remained indebted to the FmHA from 1969 to 1989, when the FmHA offered a program whereby the FmHA loan could be purchased. Sequoyah-7 participated in that program by purchasing its loan from the FmHA in 1989. Sequoyah-7 used money from a loan from the National Bank For Cooperatives to payoff the FmHA loan. Sequoyah-7 remains indebted today for the borrowing from National Bank for Cooperatives. On September 28, 1994 Sequoyah-7 again obtained a loan from the FmHA, on which it remains indebted today.

The *"purchase"* of the loans by Sequoyah-7 was conducted pursuant to the Agricultural Credit Act of 1987

(the "Act"), which provided in pertinent part that the protections afforded by § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold". The Act mandated as follows:

1. The Secretary of Agriculture was required to sell notes and other obligations held by the Rural Development Insurance Fund; Act, Oct. 21, 1986, P.L. 99-509, Title I, Subtitle A, § 1001(a), (c)-(e), 100 Stat. 1874; § 1001(f) and (g), as added Jan. 6, 1988, P.L. 100-233, Title VIII § 803, 101 Stat. 1714; § 1001(h) as added Dec. 12, 1989, P.L. 101-220, § 12, 103 Stat. 1883, hereinafter referenced as "7 U.S.C. § 1929a, Other Provisions".

2. The debtor under the note or other obligation was provided a "right of first refusal" to "*purchase*" the note or other obligation [Title 7 U.S.C. § 1929a, Other Provisions, Subsection (f)]; and

3. The protection afforded by § 1926(b) shall remain applicable to all notes or other obligations "sold or intended to be sold under this section" [Title 7 U.S.C. § 1929a, Other Provisions, Subsection (g)].

The wording and intent of this legislation was to provide that the Debtor (Water District) would retain the protections of § 1926(b) for at least the period of the note for any note sold or intended to be sold under this section whether such note was purchased by a third party or the Water District itself.

The Supreme Court of Colorado has addressed this very issue holding that the "reacquisition" of the indebtedness by

the water district "did not discharge the underlying debt" for the purpose of § 1926(b), noting that:

> Therefore, we are guided by the unambiguous language in section 803(g), extending the protection of section 1926(b) to 'all notes or other obligations sold or intended to be sold under this section.' . . . this language supports our conclusion that the 1981 revenue bond was not discharged when the Defendant reacquired the instrument from the FmHA in 1988.
>
> * * *
>
> The fact Congress provided a comprehensive scheme for selling bonds held by the FmHA back to the issuers also supports our conclusion that Congress intended to allow an issuer to reacquire its bond or note without losing the protection provided under § 1926(b).

City of Grand Junction v. UTE Water Conservatory District, 900 P.2d 81, 91 (Co. 1995).

The Alabama Supreme Court has reached the same conclusion. See: *City of Wetumpka v. Central Elmore Water Authority*, 703 S.2d 907, 913 (Ala. 1997).

The Sixth Circuit in *Scioto County Regional Water District No. 1 v. Scioto Water Inc.*, 103 F.2d 38 (Sixth Cir. 1996) held that § 1926(b) protection is only extended when the notes are purchased by third parties. However such decision ignores the plain language of Title 7 U.S.C. § 1929a, Other Provisions.

The Court in *City of Wetumpka* found the rationale of the Colorado Supreme Court in *City of Grand Junction* to be superior to that used by the *Scioto* court. *City of Wetumpka*, at 913. The *Scioto* court distinguished the *City*

of Grand Junction case, noting that *City of Grand Junction* found that § 1926(b)'s protection extended to those that buy back their indebtedness *with the intent not to discharge the instrument*. Although Sequoyah-7 contends intent is not an issue in relation to the extension of § 1926(b) protection under the plain language of the Act, 7 U.S.C § 1929a, Other Provisions, the undisputed evidence here is that the indebtedness was not extinguished but continues in the form of a loan from the National Bank For Cooperatives.

ARGUMENT TWO: THE TENTH CIRCUIT'S REJECTION OF THE "BRIGHT LINE RULE" IS INCONSISTENT WITH FEDERAL LAW

The Courts have universally held that the purposes of § 1926(b) are "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user costs, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *North Alamo Water Supply v. City of San Juan, Texas*, 90 F.3d 910, 915 (5th Cir., 1991)

Section 1926(b) furthers its purposes by protecting the territory served by such association against competitive facilities which may be developed with the expansion of municipal boundaries:

> "A new provision [section 1926(b)] has been added to assist in protecting the territory served

> by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309.

> "The service area of a federally indebted water association is ***sacrosanct***. Every Federal Court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA – indebted rural water association from municipal encroachment." (Emphasis added)

North Alamo Water Supply v. City of San Juan, Texas, 90 F.3d 910, 915 (5th Cir. 1996).

The Courts, which have addressed § 1926(b), make it clear that the statute should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems, whatever form the competition may take:

> "The clear message of the three federal cases applying 7 USC § 1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems."

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421, 425 (S.D. Ind. 1988), affirmed at 895 F.2d 311 (7th Cir. 1989).

A municipality is simply not allowed to encroach upon the services provided by a Rural Water District ***by any means***, including condemnation:

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of § 1926(b).

City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987); see also *Glenpool Utility Services v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988); and *Moore Bayou Water Association, Inc. v. Town of Jonestown*, 628 F.Supp. 1367 (N.D. Miss. 1986).

Keeping in mind the purposes to be served by § 1926(b) and the consistent rulings that § 1926(b) is to be liberally construed to further those purposes, it is evident that § 1926(b) does not allow a *race* to construct service lines. It is not the first entity which constructs a line to an area that has the right to serve that area (which would be the result if Muldrow's interpretation is adopted). Such an interpretation would defeat the stated purposes of § 1926(b) by decreasing the number of potential users of such systems and thereby increasing the per-user costs.

The appropriate rule is that a water district makes water service available under § 1926(b) in either of two alternative ways: (1) The "Bright Line Rule", by inclusion of the customers within the geographic boundaries of the district as established by state law (having the legal obligation to provide service) *or* (2) the "Pipes In The Ground Test" by having the right to provide service and the facilities within the proximity of the area from which service could be made within a reasonable time.

The Fifth Circuit held that a duty to provide service is the *"legal equivalent"* to making service available:

> To secure the protections of § 1926(b) the Utility must establish that (1) it has a continuing indebtedness to the FmHA, and (2) the City has encroached on an area to which the Utility "made service available." As of the end of 1993, the Utility owed the FmHA approximately $12,000,000. The City does not contest that the first, "indebtedness" element is satisfied. Instead, it contends that the Utility failed to establish the second, "made service available" element. We disagree.
>
> Under Texas law, the Certificate gives the Utility the exclusive right to serve the area within its CCN and obligates it "to serve every consumer within its certified area and . . . render continuous and adequate service within the area or areas." **We hold that the Utility's state law duty to provide service is the *legal equivalent* to the Utility's "making service available" under § 1926(b).** When confronted with a similar issue, other courts have reached the same result, holding that *when state law obligates a utility to provide*

> *water service, that utility has, for the purposes of § 1926(B), "made service available."*
>
> In the alternative, the district court found as a factual matter that the Utility had "made service available." Specifically, the district court made three findings of fact relevant to this conclusion: (1) The Utility current provides water service to subdivisions adjacent to the disputed areas; (2) the Utility has lines and adequate facilities to provide service to the disputed areas; (3) the Utility has not refused service to anyone who has requested service within the Certificated Area. These findings of fact are not clearly erroneous. Accordingly, on the strength of these alternative legal and factual determinations, we affirm the district court's conclusion that the Utility had "made services available" to the disputed areas. As a result, we also agree with the holding of the district court that the City violated § 1926(B).

North Alamo, at 915-916. (Emphasis added)

Lexington-South Elkhorn Water District v. City of Wilmore, 93 F.3d 230, (6th Cir. KY, 1996) at first glance appears to contradict *North Alamo*. However, upon closer scrutiny it becomes clear that unlike Oklahoma and Texas, the water districts in Kentucky are not established by well defined geographic boundaries at creation. In Kentucky, the water district must apply for and receive a Certificate of Convenience and Necessity in order to construct and operate a water distribution system in a particular area. Ky. Rev. Stat. Ann. § 278.020(1). In the *Lexington* case, the water district had not made such an application and had not received the requested certificate in relation to the area in dispute, i.e., the area challenged was not

within the geographic boundaries of the water district as defined by state law. *Lexington* at p. 235.

In Oklahoma, as in Texas (*North Alamo*), once a water district is established it has the right and authority to construct and operate a water distribution system within its entire Territory. In fact, in Oklahoma the procedure to establish the Territory of the water district requires a showing of need and convenience. (Title 82 O.S. § 1324.6).

In *Sioux Center*, the Court reached the same conclusion as did the *North Alamo* Court, i.e., that "a legal right and responsibility to serve an area *may stand alone* as fulfilling the 'made service available' requirement of § 1926(b)." *Rural Water System #1 v. City of Sioux Center*, 967 Supp. 1483, 1526 (N.D. Iowa, 1997).

A reading of the *North Alamo* and *Sioux Center* cases reveals that a rural water district makes service available by one of two methods:

1. By having the obligation to provide service, i.e., inclusion of the customers within the district's geographic boundaries as established by state law, *or*

2. If there is no obligation to provide service, by having the right to provide service, and the physical ability to provide service (the "Pipe In The Ground Test").

In this case, Sequoyah-7 has made service available to the disputed areas both by having the customers included within its geographic boundaries as established by state law ("obligation to provide service") and by having "Pipe In The Ground".

As in *North Alamo,* Sequoyah-7 has an obligation to serve the residents within its Territory. Oklahoma state law controls the creation of a rural water district allowing their creation for the purpose of "developing and providing an adequate rural water supply . . . to meet the needs of the rural residents within the Territory of the district." (Title 82 Oklahoma Statutes § 1324.3)

The Act also provides that any landowner within the District may purchase a "benefit unit" [Title 82 Oklahoma Statutes § 1324.12), *which in turn arms the landowner with a "legal right" to a service connection to the district's facilities* ***[Title 82 Oklahoma Statutes § 1324.2(7)].***

Sequoyah-7's obligation to provide service to the residents within its Territory is further supported by the fact that Sequoyah-7 is specifically authorized by state law to borrow money from the Federal Government. [Title 82 Oklahoma Statutes § 1324.10(A)(4)]. This in turn provides Sequoyah-7 with the exclusive right to sell water within its Territory pursuant to Title 7 U.S.C. § 1926(b) and imposes upon Sequoyah-7 the obligation "To provide adequate service to all persons within the service area who can feasibly and legally be served. . . . " 7 CFR § 1942.17(n)(2)(vii).

> "Utility-type service facilities will be installed so as to serve any user within the service area who derives service and can be feasibly and legally served. Applicants and borrowers must obtain written concurrence of the FmHA or its successor agency under Public Law 103-354 prior to refusing service to such user. Upon failure to provide service which is reasonable

> and legal, such user shall have direct right of action against the applicant/borrower."

7 C.F.R. § 1942.17(e)(1).

The term "utility-type service" includes the sale of water:

> "Facilities must be located in rural areas except for utility-type services such as *water*, sewer . . . "

7 C.F.R. § 1942.17(b)(2).

The obligation imposed by the above referenced subsections of 7 C.F.R. § 1942.17 is *adopted by the State* and applies to a rural district because by empowering a rural water district to borrow funds from the federal government, and by borrowing such funds, the state *adopts and is bound* by all conditions which come with said borrowing:

> "In so borrowing, Oklahoma – through its authorized entity District No. 2 – bound itself and all of its subdivisions, including the City of Glenpool, to the conditions it had accepted".
>
> * * * *
>
> Congress acted within its power in passing 7 USC § 1926. Oklahoma authorized District No. 2 to borrow under that legislation, and in so doing *accepted the conditions accompanying any such loans.* (Emphasis Added)

Glenpool Utility Services v. Water Dist. No. 2, 861 F.2d 1211, 1216-1217 (10th Cir. 1988).

Under this framework, one of the conditions to the loan is that Sequoyah-7 has the duty to provide service to all residents within its Territory [7 CFR § 1942.17(n)(2)(vii)]

which is the "legal equivalent" of "making service available." See *North Alamo* at pp. 915-916.

The 10th Circuit agreed Sequoyah-7 had a legal obligation to provide service under the Federal Regulations (Petitioners' Appendix at p. 23a, footnote No. 9), but concluded such obligation was not the equivalent of making service available for purposes of § 1926(b).

As in *City of Madison,* this Court should adopt a "Bright Line Rule" which prohibits a municipality from selling water within an indebted water district's territory as established by state law, thus eliminating costly litigation such as this:

> "A condemnation case impinging on a rural water authority could easily involve both state and federal court litigation, high legal fees and considerable delay, to the ultimate detriment of the municipality, the rural water authority, and the consumers of water service. *A bright-line rule which prohibits condemnation throughout the FmHA loan term at least creates certainty for the municipal planner and the rural water authority, even if it limits the municipality's options.* (Emphasis added)
>
> * * *
>
> To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts.

City of Madison v. Bear Creek Water Ass'n, 816 F.2d 1057, 1059-1060 (5th Cir. 1987).

The "Bright Line Rule" described in *City of Madison* makes the best sense because it furthers the purposes of § 1926(b), creates certainty and avoids costly litigation. If the Court does not adopt the "Bright Line Rule", then it becomes a question of fact each and every time a new customer locates within the water district, i.e., does the water district have facilities in close enough proximity to qualify for § 1926(b) protection? The "Bright Line Rule" avoids such litigation by holding that if the customer is located within the Territory of the water district, as established by state law, then the indebted water district has the exclusive right and obligation to serve that customer.

The adoption of a "Bright Line Rule" is particularly appropriate in states, such as Oklahoma, where the water district is established with defined geographic boundaries. Under Oklahoma law in order to create, add to or subtract from the territory of the water district, a petition requesting such relief must be filed with the County Commissioners, who set the petition for public hearing [82 Oklahoma Statutes § 1324.5]. At the public hearing, the County Commissioners are to determine several things:

1. Whether proper notice of the hearing has been given as required by Section 1324.5 of this title;

2. Whether the rural residents of the area described in the petition are without an adequate water supply, sewage facilities, gas distribution facilities or solid water management system to meet their needs;

3. Whether the construction, installation, improvement maintenance and operation of all or a combination of water words, sewage facilities and solid waste management systems are necessary to provide an adequate water supply, sewage facilities, gas distribution facilities or solid waste management system to serve rural residents of the district;

4. Whether such improvements or works will be conducive to and will tend to promote the public health, convenience and welfare;

5. The area which should be included in the district; and

6. Whether there is sufficient water available for purchase or available for appropriation by the Oklahoma Water Resources Board.

Title 82 O.S. § 1324.6.

Because state law decides a water district's territory, and the County Commissioners make findings that the inclusion of an area into a water district is conducive to the public health, convenience and welfare, it is inappropriate for the Court to follow any rule other than the "Bright Line Rule" in relation to § 1926(b). To do so, would be to effectively remove areas from the water district's territory in contravention to state and federal law.

CONCLUSION

If the Court grants certiorari in this case to Muldrow in an attempt to put an end to litigation based upon 7 U.S.C. § 1926(b), and for the purpose of clarifying the standard for interpretation and explaining the remedies available, the court should likewise address the issues presented by this Conditional Cross-Petition For Certiorari for the same reasons.

Respectfully submitted,

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OPPOSITION

BRIEF

Supreme Court, U.S.
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No. 99-1256

IN THE
SUPREME COURT OF THE UNITED STATES

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Conditional Cross-Petitioner,

v.

TOWN OF MULDROW, et al.,
Cross-Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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STATEMENT OF THE CASE

Sequoyah's Statement of the Case is incomplete in at least one respect. Sequoyah asserts on page 9 of its Cross-Petition that it purchased its original federal loans on May 5, 1989. This assertion is inconsistent with the conclusions reached by the District Court and the U.S. Court of Appeals for the Tenth Circuit. Both the District Court and the Tenth Circuit concluded that Sequoyah "purchased *or paid off* its outstanding indebtedness to the FmHA on May 5, 1989. All promissory notes to the FmHA were marked 'SATISFIED IN FULL - FmHA.'" [Exhibit B, at p. 36a (emphasis added); *see also* Exhibit A, at p. 4a.] This distinction between Sequoyah's assertion and the lower courts' factual conclusions is important because of existing circuit-made case law on the impact on Section 1926(b) protection of the satisfaction of an outstanding loan from the FmHA.

ARGUMENT AGAINST GRANTING SEQUOYAH'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Muldrow agrees with Sequoyah on one issue: that the test for application of 7 U.S.C. § 1926(b) should be reviewed by the U.S. Supreme Court. In its conditional cross petition for writ of certiorari, Sequoyah argues that the Court should adopt a "bright line rule" for application of Section 1926(b). Sequoyah supports its proposed "bright line rule" with selective quotation from a few decisions from courts that have taken an extreme approach to Section 1926(b) interpretation.

The complexities of state law cause such a "bright line rule" to be unworkable. In some states, the established

territory of a rural water association qualifying for federal loans is determined on a step-by-step basis, with each addition to the territory approved after a careful analysis of the needs of the area and the capacity of the rural water association. In other states, such as Oklahoma, the state statutes governing creation of a rural water association allow a one-time formation document to include a description of a vast and typically vaguely described area as the association's territory. The association's original territory could include areas that are located significant distances from the association's water distribution facilities. In some cases, an association's territory includes land that is separated from the association's water distribution facilities by a highway or a body of water. As a result, it is nearly impossible for the association to serve the water needs of its entire territory without substantial additional capital expenditures.

Sequoyah's position on the "bright line rule" must be viewed with skepticism, particularly when it is understood that Sequoyah would argue against any action by governing state agencies to remove an area from a rural water association's territory. *See Pittsburg County Rural Water Dist. No. 7 v. McAlester*, No. CIV-97-185-B, 1997 WL 835210, slip op. at *7 - *8 (E.D. Okla. Nov. 26, 1997). The "bright line rule" would provide anticompetitive protection for areas that were included within a rural water association's territory long before the association borrowed funds from the federal government. The anticompetitive protection would apply even if the association has insufficient capacity or facilities to serve the area. Under Sequoyah's proposed scheme, landowners in the area would be powerless to remove their land from the rural water association's territory.

In short, Sequoyah's proposed "bright line rule" ignores the clear terms of the statute. The rule proposed by Sequoyah should be rejected in favor of the standard offered by Muldrow in its Petition for Writ of Certiorari, filed in Case No. 99-1081.

ARGUMENT 1

Every federal court to consider the issue has rejected the argument advanced by Sequoyah in its Cross Petition that it should receive continued Section 1926(b) protection based on federal loans that were satisfied in full.

The first question presented by Sequoyah's Cross Petition rests solely on a legal issue – whether Section 1926(b) protection was extinguished when Sequoyah's predecessor, Rural Water Corporation, satisfied its obligations to the FmHA on May 5, 1989. The Agricultural Credit Act of 1987 contained a provision known as "subsection (g)," stating that 7 U.S.C. § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold" under the Agricultural Credit Act. *See* 7 U.S.C. § 1929a note ("Applicability of Prohibition on Curtailment or Limitation of Service"). *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38, 40 (6th Cir. 1996), *cert. denied*, 521 U.S. 1111 (1997). Sequoyah's Cross Petition raises the issue of whether subsection (g)'s provision that Section 1926(b) applies to "all" obligations "sold or intended to be sold" means that Section 1926(b)'s protection extends to a borrower that buys back its own loans from the FmHA, effectively extinguishing them. *Id.*

Every federal court that has addressed this issue, including the District Court and Tenth Circuit in this case, has decided the issue in Muldrow's favor. *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38, 43 (6th Cir. 1996), *cert. denied*, 521 U.S. 1111 (1997); *Sequoyah County Rural Water Dist. No. 7 v. Muldrow*, 191 F.3d 1192, 1200 (10th Cir. 1999); *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 173 F.3d 517, 523 (4th Cir. 1999), *aff'g* 972 F. Supp. 951, 957-59 (E.D.N.C. 1997); *Rural Water System #1 v. Sioux Center*, 967 F. Supp. 1483, 1523 (N.D. Iowa 1997), *aff'd*, Nos. 98-4160 & 99-2005, 2000 WL 62098 (8th Cir. Jan. 26, 2000); *Pittsburg County Rural Water Dist. No. 7 v. McAlester*, No. CIV-97-185-B, 1997 WL 835210, slip op. at *5 (E.D. Okla., Nov. 26, 1997); *see also Public Water Supply Dist. No. 10 v. Peculiar*, 971 S.W.2d 849, 852 (Mo. Ct. App. 1998).

The *Scioto County* court was the first federal court to address the argument raised in this case by Sequoyah in its first question presented on petition for certiorari. The plaintiff rural water association in Scioto County argued that bond issuers (or FmHA borrowers) "that exercised their right to buy back their bonds are entitled to the same § 1926(b) curtailment protection that is available to third-party bond purchasers." *Id.* The plaintiff rural water association argued that viewing subsection (f) and subsection (g) together leads to the conclusion "that the bond issuer's right of first refusal incorporates the right to continued protection against curtailment." *Id.* "Water 1 insists that it is therefore entitled to the same § 1926(b) protection that would have been available to a third-party purchaser of its bonds." *Id.*

In *Scioto County*, the court's conclusion on this issue rested on one critical fact. The plaintiff rural water

association's obligation to FmHA was marked "paid in full." *Id.* at 42. As a result, its FmHA debt "was thus discharged, not sold." *Id.* Based on this critical fact, the *Scioto County* court concluded that "[w]hen an [FmHA bond] issuer buys back it own bond and cancels the debt, ... it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to one of the main legislative purposes in enacting § 1926(b) – safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid." *Id.*

This holding by the *Scioto County* court is conclusive in this case. The earlier FmHA loans received by Sequoyah's predecessor, Rural Water Corporation, were repaid by Rural Water Corporation on May 5, 1989. As the trial court found, "[a]ll promissory notes to the FmHA were marked 'SATISFIED IN FULL – FmHA.'" [Exhibit B, at p. 36a; *see also* Exhibit A, at p. 4a.] As a result, the FmHA obligations of Rural Water Corporation were extinguished on May 5, 1989, and any Section 1926(b) protection enjoyed by Rural Water Corporation ended at that time.

This conclusion is consistent with the decisions of all subsequent federal courts that have addressed the issue of the cancellation of FmHA indebtedness. In 1997, the U.S. District Court for the Northern District of Iowa conducted an in-depth review of legislative history related to the issue of the impact of extinguishment of FmHA debt on Section 1926(b) protection. *Sioux Center*, 967 F. Supp. at 1521-23. Based on this review, the *Sioux Center* court determined that it "can only conclude ... that the protection of § 1926(b) through subsection (g) does not extend to a

party such as RWS #1 who bought back its notes pursuant to subsection (f), and thereby extinguished them. Consequently, RWS #1 lost the protections of § 1926(b) when it bought back its notes in 1988 and did not regain any protection of § 1926(b) until RWS #1 again became indebted to the United States in 1992." *Id.* at 1523. In *Sioux Center*, the plaintiff rural water association's FmHA loans were marked "paid in full" at the time that they were refinanced. *Id.* at 1502. The district court's decision was recently affirmed by the U.S. Court of Appeals for the Eighth Circuit. *Rural Water System #1 v. Sioux Center*, Nos. 98-4160 & 99-2005, 2000 WL 62098 (8th Cir. Jan. 26, 2000).

Also in 1997, the U.S. District Court for the Eastern District of North Carolina the issue of the impact of extinguishment of FmHA debt on Section 1926(b) protection. *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 972 F. Supp. 951, 956-59 (E.D.N.C. 1997). In *Bell Arthur*, the plaintiff rural water association conceded that its earlier FmHA debt "may technically have been 'satisfied' or 'paid in full.'" *Id.* at 956. Nonetheless, the plaintiff rural water association argued that its participation in a congressionally authorized "buy-out" program – the same program addressed by the *Scioto County* and *Sioux Center* courts – provided it with continued Section 1926(b) protection. *Id.* Relying on *Scioto County* and *Sioux Center*, the *Bell Arthur* court concluded that "any protection afforded to BAWC pursuant to § 1926(b) was extinguished when it paid off its FmHA loans in 1987." *Bell Arthur*, 972 F. Supp. at 959. The district court decision was affirmed by the U.S. Court of Appeals for the Sixth Circuit, which specifically affirmed the district court's decision on this issue. *Bell Arthur Water Corp. v.*

Greenville Util. Comm'n, 173 F.3d 517, 523 (4th Cir. 1999).

On November 26, 1997, the U.S. District Court for the Eastern District of Oklahoma addressed facts that are closely similar to the facts in this case. *Pittsburg County Rural Water Dist. No. 7 v. McAlester*, No. CIV-97-185-B, 1997 WL 835210, slip op. at *5 (E.D. Okla., Nov. 26, 1997). The earlier promissory notes owed by Pittsburg County Rural Water District No. 7 to FmHA had been "refinanced" in 1989 through the same congressionally-mandated "buy-out" program that was addressed by the *Scioto County*, *Sioux Center*, and *Bell Arthur* courts. *Id.* at *1. "The promissory notes to the FmHA were marked 'SATISFIED IN FULL - FmHA' and the debt was no longer carried upon Pitt-7's financial records." *Id.* Relying on *Scioto County*, *Sioux Center*, and *Bell Arthur*, the *McAlester* court concluded that "[a]t that point in time, any protections enjoyed by Pitt-7 under § 1926(b) ceased an no action taken by the City prior to that time is actionable in this case." *Id.* at *5.

On June 16, 1998, the Missouri Court of Appeals addressed the issue of the impact on Section 1926(b) protection of the extinguishment of FmHA debt. *Public Water Supply Dist. No. 10 v. Peculiar*, 971 S.W.2d 849, 852 (Mo. Ct. App. 1998). The *Peculiar* court noted that "[n]either subsection (g) nor any other statutory language mentions service area protection in the event a water district takes advantage of its right of first refusal and decides to refinance its loan through issuance of refund bonds or a conventional bank loan." *Id.* at 852. In *Peculiar*, the rural water association "extinguished its indebtedness to FmHA in July, 1987 when it repurchased [its] 1983 bonds, and FmHA returned them, marked

'Cancelled.'" *Id.* Based on these facts, the *Peculiar* court concluded that the rural water association "did not intend that the debt on the 1983 bonds remain outstanding. Instead, it issued a new series of bonds and sold them to various private parties to finance the repurchase and subsequent cancellation of the 1983 bonds. When faced with identical fact situations, where a rural water district refinances its FmHA loan and in the process completely extinguishes its debt on the bonds purchased by [sic] the government, other jurisdictions hold that § 1926(b) protection is lost." *Id.* at 853.

In its conditional cross petition for writ of certiorari, Sequoyah is faced with a difficult challenge on this issue. Sequoyah cannot avoid the fact that all federal courts that have addressed the issue have concluded that Section 1926(b) protection ends when an FmHA loan is paid and marked as "satisifed" or "paid in full." Sequoyah cannot avoid the fact that the most critical factual issue relied upon by the *Scioto County*, *Sioux Center*, and *Bell Arthur* courts is clearly against Sequoyah in this case: As the trial court found, "[a]ll promissory notes to the FmHA were marked 'SATISFIED IN FULL - FmHA.'" [Exhibit B, at p. 36a; *see also* Exhibit A, at p. 4a.] Faced with this daunting challenge, Sequoyah can turn only to two state-court decisions that have reached a different conclusion on narrow and distinguishable facts. [Cross Petition, at pp. 13-14 (citing *Grand Junction v. UTE Water Conservatory Dist.*, 900 P.2d 81 (Colo. 1995), and *Wetumpka v. Central Elmore Water Auth.*, 703 So. 2d 907 (Ala. 1997).

The decision by the Supreme Court of Colorado in *Grand Junction v. UTE Water Conservatory District* was closely examined by both the *Scioto County* and *Sioux Center* courts. In *Scioto County*, the U.S. Court of Appeals

for the Sixth Circuit distinguished the *Grand Junction* decision. "In that case, the Colorado court found that § 1926(b)'s protection extends to those that buy back bonds only if the bonds are reacquired 'with the intent not to discharge the instrument.' 900 P.2d at 92. The *Ute Water* court analyzed the question of intent and looked to Colorado law to determine whether the reacquisition of a bond discharged the debt. Unlike the loan documents in *Ute Water*, the loan documents in this case were marked 'paid in full.'" *Scioto County*, 103 F.3d at 42. The point of distinction upon which the *Scioto County* court relied was the rural water association's treatment of the paid FmHA obligation. In *Scioto County*, as in the case before this Court, the FmHA obligation was marked as paid in full.

Sequoyah's treatment of this issue in its conditional cross petition for writ of certiorari, and in particular its treatment of the *Scioto County* decision, reveals the weakness of its position. Sequoyah's only effort to persuade this Court to disagree with the *Scioto County* decision is to argue that the *Scioto County* court determined that Section 1926(b) protection "is only extended when the notes are purchased by third parties," and to argue that "such decision ignores the plain language of [7 U.S.C. § 1929a]." [Cross Petition, at p. 13.]

First, Sequoyah's characterization of the *Scioto County* court's decision misstates its rationale. The *Scioto County* court concluded that "[w]hen an issuer buys back its own bond and cancels the debt, ... it no longer qualifies as a debtor for § 1926(b) protection." *Scioto County*, 103 F.3d at 42. Thus, the *Scioto County* court leaves open the possibility that, in a *Grand Junction* circumstance where "a bond issuer ... reacquire[s] its own bond without

extinguishing the debt," as allowed by Colorado law. *Id.* at 41.

Second, Sequoyah offers no support whatsoever for its conclusory argument that the *Scioto County* decision "ignores the plain meaning" of 7 U.S.C. § 1929a. Without elaboration by Sequoyah regarding its "plain meaning" argument, it would be difficult for the Respondents to respond to the argument. However, Sequoyah may be referring to arguments raised by the plaintiff rural water association in *Sioux Center*. In *Sioux Center*, the plaintiff argued that the plain meaning of subsection (g) to 7 U.S.C. § 1929a would include, within the extended protection offered by subsection (g), those FmHA bonds that are repurchased by the rural water association that is obligated on the bonds. *Sioux Center*, 967 F. Supp. at 1516-20. The *Sioux Center* court rejected that argument, holding that "it is irrational to read subsection (g) as including notes sold under subsection (f) within a strained reading of notes 'intended to be sold under this section,' when a sale under subsection (f) involves significantly different timing and terms from a sale under subsections (a)-(e)." *Sioux Center*, 967 F. Supp. at 1520.

The Court should reject Sequoyah's request for certiorari review of this issue. Sequoyah has failed to show a disagreement among the federal courts addressing the issue. The federal courts that have addressed the issue have properly applied federal statutory law, and have determined that a rural water association that satisfies its federal debt, whether through refinance or repurchase, is no longer entitled to Section 1926(b) protection based on that debt.

ARGUMENT 2

Sequoyah has misinterpreted and overstated the test adopted by a handful of federal courts, offered here by Sequoyah as a "bright line rule."

Muldrow agrees with Sequoyah that the Court should review and address the proper standard for application of the anticompetitive protection found in 7 U.S.C. § 1926(b). The "bright line rule" offered by Sequoyah in the second question presented in its conditional cross petition for writ of certiorari, however, is inconsistent with the terms of the statute.

The terms of Section 1926(b) require, as a condition for any anticompetitive protection, that a rural water association make water service available to its claimed customers. The nature of rural water associations formed under state law requires that the complexities of state law be considered in determining whether the association has made service available. The federal courts faced with the issue have looked to state law to determine the boundaries of the rural water association, and to determine whether a rural water association has made service available. *Sioux Center*, 967 F. Supp. at 1525, 1530; *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996); *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230 234-35 (6th Cir. 1996).

The *Sioux Center* court defined the importance of state law to this determination. "State law, and only state law, ... defines a municipality's right to annex portions of the association's service area, just as state law, and only

state law, otherwise defines where it is the association can legally initiate or continue to provide service. If the association again becomes indebted to the FmHA, its protected service area is defined by state law as of the date of the renewed indebtedness." *Sioux Center*, 967 F. Supp. at 1530.

At least one court has determined that a state law duty to provide service "is the legal equivalent to" making service available under Section 1926(b). *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 916 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996). In this case, the Tenth Circuit rejected the notion that a duty to serve is the equivalent of making service available. On appeal, the Tenth Circuit was asked to determine whether Oklahoma law imposed on rural water associations a duty to serve their customers. The Tenth Circuit determined that state law imposed no such duty to serve. [Appendix A, at p. 23a.]

In urging a reversal of the Tenth Circuit on this issue of state law, Sequoyah references several provisions of the Oklahoma statutes governing formation of rural water districts. First, Sequoyah urges that its claimed legal obligation to serve "residents within its Territory" is found in Okla. Stat. tit. 82, § 1324.3. Section 1324.3 provides that "[p]ublic nonprofit rural water districts ... may be organized under this act for the purpose of developing and providing an adequate rural water supply, gas distribution facilities, sewage disposal facilities and solid waste management system to serve and meet the needs of rural residents within the territory of the district." Okla. Stat. tit. 82, § 1324.3 (1991). This statement of purpose falls far short of the creation of a duty to provide water service, or

any other utility, to residents of the rural water district's territory.

To extend the general statements contained in Section 1324.3 to impose an obligation on Oklahoma rural water associations would be contrary to general principles of statutory construction. Courts generally are not eager to interpret statutes as imposing obligations or liabilities on a state agency, unless the obligation is clearly stated in the statute. *See, e.g., Mariposa County v. Merced Irrigation Dist.*, 196 P.2d 920, 925 (Cal. 1948); *West Norman Timber, Inc. v. State*, 224 P.2d 635, 640 (Wash. 1950). As the *Mariposa County* court concluded, "[s]tatutes are ordinarily designed for the government of citizens and residences rather than the state, and it is settled that the state is not bound by general words of a statute or code provision which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it, unless the intent to bind it thereby otherwise clearly appears." *Mariposa County*, 196 P.2d at 925 (quoting 23 Cal. Jur. 625).

Second, Sequoyah points to the "benefit unit" system contained in Okla. Stat. tit. 82, § 1324.12 as the source of its claimed legal obligation to serve "residents within its Territory." The "benefit unit" system demonstrates that water service to residents within Sequoyah's territory is a function of Sequoyah's discretion, rather than a "duty to serve." Section 1324.12 provides as follows:

> .... The total benefits of any such improvement shall be divided into a suitable number of benefit units. Upon determining a

schedule of benefit units and unit fees, the board of directors shall cause a declaration of availability of such units for subscription to be entered in its minutes and except for residents of cities and towns as provided in paragraph 5 of Section 1324.2 of this title any individual who fails to become a participating member within thirty (30) days thereafter shall not be eligible to hold office as a director, nor shall any individual, firm, partnership, association, or corporation which fails to become a participating member within ninety (90) days after such declaration be qualified to participate at any meeting or vote at any election held thereafter unless such individual, firm, partnership, association, or corporation shall thereafter become a participating member. *Each landowner within the district shall subscribe to a number of such units in proportion to the extent he desires to participate in the benefits of the improvements. As long as the capacity of the district's facilities permits*, participating members of the district may subscribe to additional units upon payment of a unit fee for each such unit. *Owners or tenants of land located within the district who are not participating members may subscribe to such units as the Board in its discretion may grant*, and upon payment of the unit fee for each such unit shall be entitled to the same rights as original participating members.

Okla. Stat. tit. 82, § 1324.12 (Supp. 1997) (emphasis added).

As can be seen from the text of the statute, the "benefit units" referred to by Sequoyah in its conditional cross petition for writ of certiorari are available only at the rural water district's discretion and the occupant's desire. Okla. Stat. tit. 82, § 1324.12 (Supp. 1997). While Okla. Stat. tit. 82, § 1324.2(7) may provide "a legal right to one service connection," Section 1324.12 limits the availability of additional benefit units to current subscribers, based on the capacity of the district's facilities. *Id.* Section 1324.12 further limits the availability of benefit units to "[o]wners or tenants of land located within the district who are not participating members" of the rural water association. Benefit units are available to such owners and tenants only upon the discretion of the rural water association's board. *Id.*

Finally, Sequoyah argues that its "legal duty to serve" can be found in the federal regulations governing FmHA loans. [Cross Petition, at p. 20 (citing 7 C.F.R. § 1942.17(n)(2)(vii)).] Faced with the absence of supporting state law, Sequoyah has turned to federal law as providing an obligation to provide service. In doing so, however, Sequoyah has overlooked the clear terms of the cases upon which it relies in making this argument. The legal obligation to provide water service, urged by Sequoyah, must be provided by state law, rather than by federal law. *See North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 916 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996). Sequoyah's claimed territory is determined by reference to state law, rather than to federal law. *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230, 234 (6th Cir. 1996); *Sioux Center*, 967 F. Supp. at 1530.

Sequoyah attempts to bootstrap the provisions of 7 C.F.R. § 1942.17(n)(2)(vii) into the Oklahoma statutes governing rural water associations, by pointing to the Oklahoma statute authorizing rural water associations to borrow money from the federal government. [Cross Petition, at p. 21.] The Court should reject this attempted bootstrap because Sequoyah has put the cart before the horse. Section 1926(b) protection, and its attendant regulations, do not apply to Sequoyah if Sequoyah has failed to meet the elements of Section 1926(b) protection. The federal obligation to provide water, therefore, does not apply to Sequoyah until it can establish that it has "made service available." This is the conclusion that was reached by the Tenth Circuit in this case, when faced by the same argument by Sequoyah. [Appendix A, at p. 23a-24a n.9.]

Even if this Court determines that an obligation to serve may be based on federal law, the regulation cited by Sequoyah does not provide the necessary obligation to serve. Section 1942.17 does not impose an obligation to serve. A rural water association may deny water service to a user within the district's service area, even if the user desires service. 7 C.F.R. § 1942.17(e)(1). Section 1942.17(e)(1) states that installation of water services is dependent upon the feasibility of such service. *Id.* Similarly, water service from a rural water district may be declined by the user. *Id.*

As these authorities demonstrate, Oklahoma law imposes no obligation to serve. Sequoyah has failed to demonstrate any source of an obligation to serve occupants within its territory. As a result, the "legal-duty-to-serve" test does not apply in this case. Furthermore, it is not enough in a Section 1926(b) case for Sequoyah to simply show that it has "a precisely-drawn service area," or that it

has water lines in the general vicinity of the disputed area. *Lexington-South Elkhorn*, 93 F.3d at 234. A rural water association asserting anticompetitive protection based on 7 U.S.C. § 1926(b) should be required to show more. The clear text of Section 1926(b) requires, as a condition for anticompetitive protection, that the rural water association make service available. 7 U.S.C. § 1926(b) (protecting "[t]he service provided or made available through any such association"). To expand the concept of "made available" to reach areas that were never served by the claiming rural water association, that the rural water association could not serve, and that simply fall within a geographic territory vaguely described in a years-old formation document would be to create a legal fiction that would destroy the purpose of Section 1926(b).

CONCLUSION

For the reasons outlined above, Respondent Town of Muldrow respectfully suggests that the Court deny Sequoyah's conditional cross petition for writ of certiorari. The first question presented by Sequoyah's cross petition raises an argument that has been universally rejected by the federal courts confronted with it. The second question presented is closely aligned with the issues raised by Muldrow's Petition for Writ of Certiorari in Case No. 99-1081. However, the second question is based upon a strained reading of legal authorities, and represents an attempt by Sequoyah to impose an onerous interpretation on Section 1926(b), one that would be entirely inconsistent with the statute's plain terms.

/s/_____
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APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed August 17, 1999]

No. 98-7090

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the State of Oklahoma,
Plaintiff- Appellant,

v.

TOWN OF MULDROW, an Oklahoma Town, and MULDROW PUBLIC WORKS AUTHORITY, a public trust,
Defendants - Appellees.

CITY OF BROKEN ARROW and OKLAHOMA MUNICIPAL LEAGUE, INC.,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of Oklahoma

(D.C. No. 97-CV-578-S)

Before **PORFILIO, McKAY**, and **TACHA**, Circuit Judges.

McKAY, Circuit Judge.

Plaintiff-Appellant Sequoyah County Rural Water District No. 7 appeals the district court's entry of summary judgment in favor of Defendants-Appellees Town of Muldrow, Oklahoma, and Muldrow Public Works Authority, a public trust.[1] Plaintiff filed this action under 42 U.S.C. § 1983 claiming that, as a debtor of the Farmers Home Administration (FmHA),[2] it was entitled to the protection of 7 U.S.C. § 1926(b), namely, the exclusive right to provide water service within its service area. Plaintiff alleged that Defendants deprived it of its § 1926(b) rights by providing water service to certain customers within Plaintiff's service area. Plaintiff also sought declaratory and injunctive relief to prevent Defendants from selling or continuing to sell water

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[1] Two amicus curiae briefs were submitted in this matter, one on behalf of the City of Broken Arrow and one on behalf of the Oklahoma Municipal League, Inc. Although we have considered the arguments presented by the amici curiae in our disposition of the issues raised by the parties, we decline to address their additional arguments. See Tyler v. City of Manhattan, 118 F.3d 1400, 1404 (10th Cir. 1997) (explaining that court should use its discretion to address additional arguments raised by amici curiae only in exceptional circumstances).

[2] Although the FmHA is now known as the Rural Utilities Service, see 7 C.F.R. § 1780.3(a), to avoid confusion we will refer only to the FmHA in this opinion.

within its service area as well as damages for Defendants' past encroachments.[3]

I.

Plaintiff is a rural water district incorporated by the Board of County Commissioners of Sequoyah County, Oklahoma, to develop and provide water service to the rural residents within its territory. See OKLA. STAT. ANN. tit. 82, § 1324.3. Plaintiff was initially established in October 1966 as Sequoyah County Rural Water District No. 4. In 1969, Sequoyah-4 was dissolved and all of its assets and liabilities were assigned to an entity called the Rural Water Corporation (RWC). Finally, in March 1991, the Board of Commissioners transferred all of the assets and liabilities of RWC into Sequoyah County Rural Water District No. 7, which is Plaintiff's current name.

Oklahoma law authorizes rural water districts to borrow money from the federal government to accomplish the purposes for which they are established. See OKLA. STAT. ANN. tit. 82, § 1324.10.4. As part of the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1921-2009n, Congress authorized the Secretary of Agriculture to make or insure loans to nonprofit water service associations for "the conservation, development, use, and control of water."

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[3] Plaintiff also sought a constructive trust to remedy Defendants' alleged encroachments, but Defendants claim that Plaintiff has waived this issue on appeal by failing to raise it in its opening brief. Regardless of whether Plaintiff has waived this issue on appeal, we leave the issue of what remedy is appropriate for the district court on remand.

7 U.S.C. § 1926(a). In accordance with these provisions, RWC began borrowing funds from the FmHA in 1969 to build water service facilities. RWC eventually became indebted to the FmHA on three notes. The first note was dated April 14, 1969, and was in the amount of $384,000; the second was dated June 9, 1970, and was for $45,500; and the third, dated July 15, 1981, was for $388,000.

In 1989, RWC elected to repurchase its notes from the FmHA pursuant to a government debt buy-back program. See Omnibus Budget Reconciliation Act of 1986 [OBRA], Pub. L. No. 99-509, § 1001, 100 Stat. 1874 (1986), as amended by Agricultural Credit Act of 1987 [ACA], Pub. L. No. 100-233, § 803, 101 Stat. 1714 (1988) (codified at 7 U.S.C. § 1929a note). Accordingly, on May 5, 1989, RWC borrowed money from the National Bank for Cooperatives and purchased or paid off all of its then-outstanding indebtedness to the FmHA at a discounted rate. After the buy-back, each of the FmHA notes was marked "SATISFIED IN FULL--FmHA." Appellant's App., Vol. II at AP597, AP599. When RWC's assets and liabilities were transferred to Plaintiff in 1991, its obligations to the Bank were included in the transfer. Plaintiff remains indebted to the Bank at this writing. On September 28, 1994, as Sequoyah-7, Plaintiff took out another FmHA loan in the amount of $331,400 to fund the construction of a project entitled "Redline." Plaintiff remains indebted to the FmHA on the 1994 loan.

We are concerned in this case with three periods of time during which Plaintiff alleges that it was indebted to the FmHA and during which Defendants allegedly began serving customers within Plaintiff's territory. The first relevant period of time is between April 14, 1969, the date on which

RWC first became indebted to the FmHA, and May 5, 1989, the date on which RWC repurchased its loans from the FmHA. Sometime during this time period, Defendants began providing water service to two customers within Plaintiff's territory, the Gunter Ridge Addition and the Gold Crown Motel, which at the time was known as the Diana Motel.

Sometime between May 5, 1989, and September 28, 1994, the date on which Plaintiff obtained its final loan from the FmHA, Defendants began providing water service to the following additional customers within Plaintiff's territory:

(1) Cherokee Rock Addition, Lots 2, 13, and 14
(2) FWCC Trucking, location number 820138
(3) J.D. Hill, location number 820127
(4) Laster Realty Co., location number 839861
(5) Rasamy Mangboupha, location number 820149

After September 28, 1994, Defendants began serving the following customers within Plaintiff's territory:

(1) Cherokee Rock Phase I, Lots 1, 3-12
(2) Food Plus/Dollar General Store, location number 816937
(3) Bob Pruitt Property (John Bogner), location number 817806
(4) FWCC Trucking Office, location number 819929
(5) OK Industries (a/k/a OK Foods), location number 816893
(6) J.D. Hill Truckwash, location number 820166
(7) Doug Harvell, location number 820182

Both Plaintiff and Defendants filed motions for partial summary judgment, and Defendants filed a motion to dismiss Plaintiff's state law claims. In an Order dated June 12, 1998, the district court denied Plaintiff's motion for partial summary judgment, granted Defendants' motion for partial summary judgment, and dismissed Plaintiff's remaining claims.[4] The court first explained that to establish its entitlement to protection under § 1926(b), Plaintiff must prove that "(1) it is an 'association' within the meaning of the Act; (2) it has a continuing indebtedness to the FmHA; and (3) [Defendants have] encroached upon or invaded an area to which [Plaintiff] has 'made service available.' Appellant's App., Vol. III, Doc. 19 at AP957 (citation omitted). Noting that Defendants did not contest Plaintiff's status as an "association," the court then held that, because Plaintiff repurchased its 1969, 1970, and 1981 notes from the FmHa on May 5, 1989, it was no longer indebted to the FmHA. Thus, the court found that, as of May 5, 1989, the protection afforded to Plaintiff by § 1926(b) was "extinguished and no action taken by [Defendants] prior to that time is actionable." Id. at AP960. The court then evaluated whether Plaintiff was entitled to relief for encroachments occurring after September 28, 1994, the date on which Plaintiff obtained a new loan from the

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[4] Because the parties had entered a stipulation of dismissal as to Plaintiff's state law claims prior to the court's disposition of the partial summary judgment motions, the court noted that Defendants' motion to dismiss was moot. See Appellant's App., Vol. III, Doc. 19 at AP951 n.2. The parties also entered a stipulation of dismissal with respect to Plaintiff's two antitrust claims prior to the court's summary judgment order. See. id. Plaintiff has not raised these issues on appeal.

FmHA. Because it was undisputed that Plaintiff was indebted to the FmHA after September 28, 1994, this determination turned on whether Defendants had "encroached upon or invaded an area to which Plaintiff ha[d] 'made service available.'" Id. at AP961. The court concluded that Plaintiff had not made service available to the disputed customers because it had no duty under state law to do so, see id., and because it either did not have sufficiently proximate facilities or sufficient capacity to serve the customers. See id. at AP964-65. Its conclusion was based in part on the fact that Plaintiff "would require customers[] who are already being adequately served by [Defendants][] to pay for improvements to [Plaintiff's] distribution system." Id.

II.

We review the grant or denial of summary judgment de novo, and we apply the same legal standard employed by the district court pursuant to Federal Rule of Civil Procedure 56(c). See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

> When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. If there is no genuine issue of material fact in dispute,

> then we next determine if the substantive law was correctly applied by the district court.

Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793,796 (10th Cir. 1995).

This court has stated that "Congress enacted 7 U.S.C. § 1926(b) as part of a federal statutory scheme to extend loans and grants to certain associations providing soil conservation practices, water service or management, waste facilities, or essential community facilities to farmers, ranchers, and other rural residents." Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1214 (10th Cir. 1988). "The legislative history of section 1926(b) demonstrates that Congress intended to protect rural water districts from competition in order to encourage rural water development." City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81, 88 (Colo. 1995); see also S. REP. No. 566 (1961), reprinted in 1961 U.S.C.C.A.N. 2243, 2309 (explaining that 7 U.S.C. § 1926(b) was enacted "to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system"). In addition, § 1926(b) was intended "to provide greater security for the federal loans made under the program." Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 173 F.3d 517, 520 (4th Cir. 1999).

Section 1926(b) states in full:

> The service provided or made available through any such association shall not be

> curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b). his court has held that to receive the protection against competition provided by § 1926(b) a water association must (1) have a continuing indebtedness to the FmHA and (2) have provided or made available service to the disputed area. See Glenpool, 861 F.2d at 1214. The purpose of the second inquiry is to determine whether the disputed customers are within the water association's service area, i.e., "that area to which [Plaintiff] provided service or made service available." Bell Arthur, 173 F.3d at *525*. Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory. See North Alamo Water Supply Corp. v. City of San Juan, Tex., 90 F.3d 910, 913 (5th Cir. 1996) ("The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachments."); see also Jennings Water, Inc. v. City of North Vernon, Ind., 895 F.2d

311, 315 (7th Cir. 1989) (listing five federal courts which have concluded that § 1926 should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment).

In this appeal, Plaintiff first argues that the district court erred in finding that, when Plaintiff repurchased its notes from the FmHA, it lost the protection to which it was entitled under 7 U.S.C. § 1926(b). Plaintiff claims that it has been entitled to continued protection under § 1926(b) since 1969, when it first became indebted to the FmHA. Plaintiff also argues that all of the disputed customers are within its service area by virtue of both its legal duty to serve the customers and its capacity to serve the customers within a reasonable time after service is requested. At the very least, Plaintiff claims that genuine issues of material fact should have precluded summary judgment on the issue of whether it had or could provide sufficiently proximate and adequate facilities to serve the disputed customers within a reasonable time.

A.

We begin our analysis with the continuing indebtedness prong of § 1926(b). Because there is no question that Plaintiff was indebted to the FmHA between April 14, 1969, and May 5, 1989, and that Plaintiff again became indebted to the FmHA after September 28, 1994,[5] the

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[5] Defendants argue that, because Plaintiff obtained its 1994 loan from the FmHA to finance a particular project, this indebtedness could not be used to obtain protection for other

critical issue is the effect of Plaintiff's repurchase of its notes from the FmHA on its status as an FmHA debtor prior to 1994. Plaintiff argues that the repurchase did not disrupt its entitlement to protection from competition under § 1926(b), and that, as a result, it is entitled to relief not only for encroachments occurring prior to the repurchase but also for encroachments occurring between the date of the repurchase and the 1994 loan. Defendants urge us to affirm the district court's conclusions that the repurchase extinguished Plaintiff's protection under § 1926(b) and that any encroachments which occurred prior to May 5, 1989, are not actionable.

The legislative background of the loan repurchase program sheds some light on whether Congress intended the protection of § 1926(b) to extend to borrowers who repurchase their obligations from the federal government. Congress enacted provisions requiring the FmHA to sell its notes and other obligations "[a]s part of an overall effort to reduce the federal deficit." Ute Water, 900 P.2d at 89; see OBRA § 1001(a)-(e) (codified at 7 U.S.C. § 1929a note, subsections (a)-(e)). Subsequently, Congress amended OBRA by requiring the FmHA to provide rights of first refusal to its

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customers served by Defendants. We reject this argument for two reasons. First, even though the loan was used to fund a particular project, all of Plaintiff's territory was pledged as security for the loan. See Appellant's App., Vol. II, Doc. 12 at AP675-76. Second, we agree with the Bell Arthur court's recent conclusions that there is no statutory support for the "position that the scope of § 1926(b) protection is limited to the geographical area being financed by the loan. . . [and that] [i]t would defeat the protection[] intended by that section to [so] limit [it]. Bell Arthur, 173 F.3d at 524.

debtors before it attempted to sell the obligations to third party purchasers. See OBRA § 1001 (f), as amended by ACA § 803(f) (codified at 7 U.S.C. § 1929a note, subsection (f)). As part of the same series of amendments, Congress enacted the following provision:

> **Applicability of Prohibition on Curtailment or Limitation of Service.**--Section [1926(b)] . . . shall be applicable to *all* notes or other obligations sold or intended to be sold under this section.

OBRA § 1001(g), as amended by ACA § 803(g) (codified at 7 U.S.C. § 1929a note, subsection (g)) (emphasis added).

Although § 803(g) clearly extends the protection of § 1926(b) to situations in which the government sells notes or other obligations to third parties, courts have reached differing conclusions regarding whether § 803(g) extends the protection to issuers who repurchase their own notes or obligations from the government. The Colorado Supreme Court addressed the interpretation of § 803(g) in a case involving an issuer repurchase in which "the intent of the parties. . . was to keep the. . . bond active and not discharge the debt." Ute Water, 900 P.2d at 93. The intent of the parties was demonstrated not only by testimony to that effect but also by the fact that in transferring the bond back to the water district, the FmHA did not mark the instrument "'paid in full,' which would have canceled or discharged the debt." Id. at 94. Thus, the bond remained outstanding even "after the [water] [d]istrict reacquired the instrument." Id. The court held that § 803(g) extended the protection of § 1926(b) "to *all* notes and bonds sold by the FmHA–including those

reacquired by the issuer with the intent not to discharge the instrument, as in the present case." Ute Water, 900 P.2d at 92 (emphasis added). Thus, the result in Ute Water turned on the facts that the parties did not intend to extinguish the underlying debt and "that state law permitted a bond issuer to reacquire its own bond without extinguishing the debt." Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc., 103 F.3d 38, 41 (6th Cir. 1996) (citing Ute Water, 900 P.2d at 93), cert. denied, 521 U.S. 1111 (1997).

To date, only two federal circuit courts have addressed the issue of whether § 803(g) extends the protection of § 1926(b) to issuers who repurchase their own obligations from the government. Relying on applicable statutory language, congressional intent, and reasons of public policy, these courts have held that § 1926(b) does not apply to situations in which the issuer repurchases its own notes or other obligations from, and at the same time cancels its debt to, the government, in spite of the apparently contrary indication in § 803(g). See Bell Arthur, 173 F.3d at 523; Scioto Water, 103 F.3d at 42.

In Bell Arthur, the Fourth Circuit acknowledged that providing issuers who repurchase their notes with continuing protection from competition–the approach taken by the Colorado Supreme Court in Ute Water and advocated by Plaintiff in this case–"may have some superficial textual appeal" based on the language of § 803(g). Bell Arthur, 173 F.3d at 522. The court went on to explain, however, that "a closer reading of the applicable statutes reveals that such an interpretation is at odds with their language, the overall statutory structure, and the congressional purposes." Id. The critical distinction lay in the fact that when a third party

purchases a note from the FmHA "the issuer's indebtedness remains outstanding," but when an issuer purchases its own notes from the FmHA, and at the same time cancels the notes, "then the indebtedness ends." Id. at 523. According to the court, "[t]he latter transaction is actually a *retirement* of the debt by the issuer rather than a *sale* of the debt." Id. (emphasis added). Because "the issuer of the note who exercises the right of first refusal retires its debt *before* notes can be 'sold or intended to be sold[,]'. . . [the issuer] cannot receive the § 1926(b) protection granted by [§ 803(g)]." Id. Thus, the Fourth Circuit concluded that Congress

> could not have meant to include notes retired because retired notes need no protection. The protection afforded by § 1926(b) is meant to secure outstanding notes against default by protecting the income of the notes' issuer. When the indebtedness–whether to the federal government or to its assignees–is retired, however, no such protection is needed.

Id.

The Sixth Circuit similarly held that issuers who repurchase their notes from the FmHA are not entitled to continuing § 1926(b) protection. See Scioto Water, 103 F.3d at 42. According to the court, "[w]hen an issuer buys back its own bond and cancels the debt, . . . it no longer qualifies as a debtor for § 1926(b) protection." Id. In the instant case, because the FmHA marked the water district's bonds "'paid in full'" when the water district repurchased the bonds, the debt was "discharged, not sold." Id. Thus, the court held that, under the circumstances, § 803(g) applies only to

obligations sold to third parties, not to debts repurchased by issuers. See id.

We agree with the Bell Arthur and Scioto Water courts that § 803(g) does not extend the protection of § 1926(b) to issuers who repurchase their obligations from the government and in so doing discharge or cancel the underlying obligation to the government. The overall structure of the statutory scheme indicates that Congress did not intend § 803(g) to apply to issuer repurchases. Because Congress enacted the provision requiring the government to offer rights of first refusal to issuers after it enacted the provisions requiring the sale of its debt to the public, it is likely that Congress considered the two types of transactions to be separate. See OBRA § 1001(a) (codified at 7 U.S.C. § 1929a note, subsection (a)); see also ACA § 803(f) (codified at 7 U.S.C. § 1929a note, subsection (f)). It follows that in referring to notes or obligations "sold or intended to be sold" in § 803(g) Congress was referring only to sales to third parties. Section 803(f) lends credence to this interpretation because it directs the government to offer rights of first refusal to issuers "'*[b]efore* conducting a sale of a portfolio of notes.'" ACA § 803(f)(1) (codified at 7 U.S.C. § 1929a note, subsection (f)) (emphasis added); see Bell Arthur, 173 F.3d at 523.

Two additional justifications support this analysis. First, when the government sells a note or other obligation to a third party, it must provide some assurance to the third party about the likelihood that the debt will be repaid. As the Fourth Circuit explained in Bell Arthur, part of the reason Congress enacted § 803(g) was "undoubtedly to make [the loans the government was selling] more secure upon sale and thus more marketable." Bell Arthur, 173 F.3d at 523. By

extending the § 1926(b) protection to water associations "'during the term' of the loan," § 803(g) gives "the third party purchaser the same assurance of repayment that the federal government had had as the holder of the notes." Id. On the other hand, there is no need to provide assurance of repayment to an issuer who repurchases its own loan. Second, depending on the terms of a third party sale, the government may remain liable to the purchaser in the event of a default by the issuer. In comparison, when an issuer repurchases its notes from the government and simultaneously cancels them, there is no risk of continued governmental liability. We therefore hold that § 803(g) does not extend the protection of § 1926(b) to issuer repurchases when the underlying debt to the government is simultaneously canceled or retired.

In this case, as in Scioto Water, the notes Plaintiff repurchased from the FmHA were marked "SATISFIED IN FULL," Appellant's App., Vol. II at AP597, AP599, and thus "the debt was. . . discharged, not sold. " Scioto Water, 103 F.3d at 42. Because the § 1926(b) protection does not extend to issuers who repurchase their own notes or other obligations from the FmHA and in so doing discharge the underlying debt to the FmHA, Plaintiff may not seek relief for encroachments which occurred or continued to occur between the date of the repurchase, May 5, 1989, and the date of the final loan, September 28, 1994. However, we still must decide whether the encroachments which occurred prior to May 5, 1989, are actionable. Citing Scioto Water, 103 F.3d at 40-42, and the district court opinion in Bell Arthur, see Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 972 F. Supp. 951,957-59 (E.D.N.C. 1997), the district court in this case held that, because the repurchase extinguished Plaintiff's

entitlement to protection under § 1926(b), no encroachments occurring prior to the repurchase were actionable. We disagree.

First, neither Bell Arthur nor Scioto Water supports the proposition that encroachments occurring prior to an issuer repurchase but during the term of indebtedness are not actionable. The Bell Arthur court simply held that the § 1926(b) protection did not extend *beyond* the date of the repurchase, see Bell Arthur, 173 F.3d at 523-24; it did not hold that water associations would not be entitled to relief for encroachments occurring *prior* to a repurchase, i.e., during the period of indebtedness. In fact, this question was not even before the Bell Arthur court because in that case the only alleged encroachment occurred in 1995, which was after the water association had repurchased its loans from the FmHA in 1989 and after it had obtained a new loan from the FmHA in 1993. See id. at 520-21. In Scioto Water, the court similarly was not required to decide the issue because the encroachment in that case occurred after the water district repurchased its debt from the FmHA. See Scioto Water, 103 F.3d at 40. As in Bell Arthur, the court merely held that the water district was not entitled to § 1926(b) protection for the period *after* it repurchased its bonds from the FmHA and canceled its debt. See id. at 42.

Second, we can think of no reason why a water association which repurchases or otherwise repays its debts should lose the protection to which it was entitled during the period of indebtedness. To so hold would defeat the purpose of offering the protection because a water association which repurchased or paid off its debt but which otherwise met the statutory requirements would have no recourse for

encroachments that occurred or began while it was indebted to the government. Such a rule clearly would defy the language of § 1926(b), which expressly prohibits encroachments "during the term of such loan." 7 U.S.C. § 1926(b). This rule would also create a disincentive for water districts to repay their loans and would encourage municipalities and other competitors to encroach without concern for any resulting liability. We therefore conclude that, even if a water association has repurchased its loan and discharged its debt to the government, encroachments which occurred during the term of the loan are protected.

Because Plaintiff was indebted to the FmHA prior to May 5, 1989, and after September 28, 1994, it has satisfied the first prong of the § 1926(b) analysis with respect to those periods. We therefore reverse and remand to the district court for further proceedings consistent with this opinion.[6]

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[6] On remand, the district court will be required to address at least three issues with respect to the pre-1989 period. First, as discussed in greater detail below, Plaintiff must demonstrate that it "made service available" to the customers that Defendants allegedly began serving before the repurchase date. Second, even if Plaintiff has met the requirements for § 1926(b) protection for this period, the applicable statute of limitations may bar Plaintiff from seeking redress. Finally, assuming that Plaintiff meets the requirements for § 1926(b) protection and that relief is not barred by the statute of limitations, the court must determine what remedy is appropriate for Defendants' encroachments of Plaintiff's territory.

B.

We now examine whether Plaintiff has established genuine issues of material fact with respect to the "made service available" prong of the § 1926(b) inquiry. Although we have determined that Plaintiff was indebted to the FmHA during the pre-1989 and post-1994 periods, we must assess whether Plaintiff made service available to the customers served by Defendants during those periods.[7] In addition, although Plaintiff cannot seek relief for encroachments occurring between May 5, 1989, and September 28, 1994, because it was not indebted to the FmHA during that period, we still must examine whether Plaintiff has established genuine issues of material fact concerning whether it made service available to the customers which Defendants began serving during that period. We undertake this inquiry for purposes of determining whether Plaintiff may seek relief for

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[7] Defendants argue that certain customers are not within Plaintiff's service area because it failed to comply with state law in forming its territory, as defined by state law, in 1991. However, because Defendants do not seem to challenge the district court's conclusion that Plaintiff "is a continuation of Sequoyah-4 and its successor, RWC," Appellant's App., Vol. III, Doc. 19 at AP957, the contours of Plaintiff's territory should be examined from the date it came into existence as Sequoyah-4. Further, this argument is not properly before us because the district court did not rule on it. For these reasons, we assume that the disputed customers are within Plaintiff's territory as it is defined by state law. Whether the customers are within Plaintiff's service area is the subject of this section of our opinion and depends on whether it made service available to them within the meaning of § 1926(b).

encroachments which continued beyond the date of the 1994 loan.

Courts are in disagreement about what is required to satisfy the "made service available" requirement of § 1926(b). One court has held that a water association may meet the requirement simply by showing that it has a legal obligation to provide water service to the customer. See North Alamo, 90 F.3d at 917 (holding that a legal duty to provide service is the "legal equivalent to. . . 'making service available' under § 1926(b)").[8] Generally, courts applying the legal duty test

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[8] Other courts have emphasized that the water association must have a legal right, under state law, to provide service to the customer. See Rural Water Sys. #1 v. City of Sioux Ctr., Iowa, 967 F. Supp. 1483, 1525 (N.D. Iowa 1997) (explaining that whether a water association has made service available depends partly on "legal authority to provide service"); Rural Water Sys. #1 v. City of Sioux Ctr., Iowa, 29 F. Supp.2d 975, 991 (N.D. Iowa 1998) (indicating that legal right to serve is required to demonstrate that association made service available); cf. Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky., 93 F.3d 230, 238 (6th Cir. 1996) (noting water district's lack of authorization to provide service under Kentucky law). The distinction between a legal *duty* to provide service and a legal *right* to provide service is crucial because, in our view, the latter is always required. Without a right to provide service arising from state law, a water association would be unable to assert its entitlement to protection under § 1926(b) in the first instance because the association would not legally have "provided or made available" any service. 7 U.S.C. § 1926(b); see also City of Sioux Ctr., 967 F. Supp. at 1527 ("Where an indebted association has no legal right to provide service, it is not required by [7 C.F.R. § 1942.17(n)(2)(vii)] to provide such service, and, logically, it also should not obtain

have looked to state law to make the determination. See, e.g., id. at 915-916 (examining utility's duty to provide service under Texas law); Bell Arthur, 173 F.3d at 526 (citing cases examining both existing facilities and state law duty to provide service and holding that nonprofit water corporation had no duty to serve under North Carolina law). Another approach to meeting the requirement is known as the "pipe[s]-in-the-ground" or "physical ability" test. Rural Water Sys. #1 v. City of Sioux Ctr., Iowa, 967 F. Supp. 1483, 1525 (N.D. Iowa 1997); see Pittsburgh County Rural Water Dist. No. 7 v. City of McAlester, No. CIV-97-185-B, 1997 WL 835210, at *6 (E.D. Okla. 1997). This test examines whether a water association "has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." Bell Arthur, 173 F.3d at 526; see also Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky., 93 F.3d 230, 237 (6th Cir. 1996) ("[W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served."). Finally, some courts have examined both the water association's state law duty to provide service and the proximity and adequacy of its facilities in determining whether it made service available. See Bell Arthur, 173 F.3d at 526. Regardless of the manner in which this second prong is satisfied, Plaintiff must have made service available "prior to the time an allegedly encroaching association beg[an] providing service in order to

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protection from § 1926(b) for its illegal provision of service."). In any event, neither party contests Plaintiff's right to provide service to the customers which are undisputably within its territory.

be eligible for [§] 1926(b) protection." Lexington-South, 93 F.3d at 237.

This court has not definitively established a standard for meeting the "made service available" requirement. In Glenpool, we relied on both the association's water "line adjacent to the property and its responsibilities [to provide water service] to applicants within its territory" in concluding that the water association had made service available to the disputed customer. See Glenpool, 861 F.2d at 1214. However, Glenpool did not hold that both a legal duty and proximate and adequate facilities *were required* to meet this element of § 1926(b). In fact, Glenpool did not expressly hold that Oklahoma water districts have a legal duty to provide service; it merely referred to a specific water district's "responsibilities to applicants within its territory" in affirming a factual finding by the district court. Id.

In this case, the district court specifically determined that Oklahoma "state law does not mandate or require rural water districts to provide water service." Appellant's App., Vol. III, Doc. 19 at AP961; see also Pittsburgh County Rural Water Dist., 1997 WL 835210, at *5 (concluding that Oklahoma law does not impose "any obligation or duty on. . . the district to provide service"). We agree. Under Oklahoma law, the provision of water service centers around the "benefit unit," which is defined as "a legal right to one service connection to the district's facilities and to participate in the affairs of the district." OKLA. STAT. ANN. tit. 82, § 1324.2(7). Landowners within a rural water district's territory may "subscribe to a number of [benefit] units in proportion to the extent [they] desire[] to participate in the benefits of the improvements" made by the districts. Id. § 1324:12. "As

long as the capacity of the district's facilities permits, participating members. . . may subscribe to additional units upon payment of a unit fee for each such unit." Id. Further, although water districts must inform the customers within their districts how many benefit units are available for subscription, the districts have discretion to grant benefit units to new applicants for service, who also must pay a unit fee. See id. Two features of these statutes convince us that Oklahoma water districts are not under a state law duty to provide service to the customers within their territories. First, water districts are not required to provide additional benefit units to existing customers unless they possess the capacity to do so. See id. The statutes do not oblige water districts to expand their facilities to provide additional service to existing customers. Second, water districts have discretion to decide whether to provide benefit units to new applicants. In short, we cannot discern from the Oklahoma statutes a legal obligation to provide service.

Although we have determined that there is no state law duty to provide service in this case, we think that the existence of such a duty is relevant to the "made service available" inquiry because it substantially affects the likelihood that the association has provided or readily can provide service.[9] Nevertheless, we do not think that a such a

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[9] Plaintiff argues, and we agree, that the federal regulations governing the FmHA loan program impose a duty to provide service on loan recipients. In fact, it is clear that by accepting loans from the FmHA, Plaintiff agreed to abide by the governing federal regulations, which specifically require the provision of adequate service to customers "within the service area who can feasibly and legally be served." 7 C.F.R.

duty, standing alone, is sufficient to meet the "made service available" requirement. For one thing, to hold that a legal duty is sufficient to meet the requirement would be contrary to the language of the statute, which provides protection only against curtailments of "service provided or made available" by water associations. 7 U.S.C. § 1926(b). In addition, allowing a water district to meet the requirement simply by showing a legal duty to serve may undermine one of the principal goals of the statute, which is to "encourage water development by expanding the number of potential users of such systems." City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057, 1060 (5th Cir. 1987). "Inherent in the concept of providing service or making service available is the *capability* of providing service, or, at a minimum, of providing service within a reasonable time." Bell Arthur, 173 F.3d at 526. If a water association has a legal duty to provide service but has no proximate or adequate facilities or cannot provide them within a reasonable time, it is the customer who suffers. For these reasons, we think that the second prong of § 1926(b) should focus primarily on whether the water association has in *fact* "made service available," i.e., on whether the association has proximate and

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§ 1942.17(n)(2)(vii); see Wayne v. Village of Sebring, 36 F.3d 517, 528 (6th Cir. 1994) (stating that 7 C.F.R. § 1942.17(n)(2)(vii) requires applicants for FmHA funds to "agree, as a condition of receiving funds, that a person within the service area who can feasibly and legally receive water service has a direct and private right of action against the fund recipient if the recipient fails to make adequate service available"). Because all FmHA loan recipients are subject to this federal duty, however, we do not think that the "made service available" requirement should turn on this duty.

adequate "pipes in the ground" with which it has served or can serve the disputed customers within a reasonable time.

As mentioned above, a water association meets the "pipes-in-the-ground" test by demonstrating "that it has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." Bell Arthur, 173 F.3d at 526. This is essentially an inquiry into whether a water association has the capacity to provide water service to a given customer. See id.; City of Sioux Ctr., 967 F. Supp. at 1525. Plaintiff argues that the district court incorrectly concluded that Plaintiff did not make service available because it either did not have facilities proximate to the customers or because its facilities were insufficient to meet the customers' needs. According to Plaintiff, genuine issues of material fact should have precluded summary judgment on these issues. We examine the customers in the order in which Defendants allegedly began providing service to them.

The Gunter Ridge Addition and the Gold Crown Motel are the only two customers which Defendants allegedly began serving between April 14, 1969, and May 5, 1989. The record shows that Plaintiff has a two-and-a-half-inch line running across the east side of the Gunter Ridge Addition and a two-inch line running across the west side. See Appellant's App., Vol. I, Doc. 6 at AP67. Both lines have been in existence since 1970. See id. The only evidence in the record indicates that the lines were large enough to meet the potable water needs of the development and that the lines could be upgraded to provide fire protection for

approximately $50,000.[10] See. id. at AP411. The record also shows that Plaintiff has a three-inch water line running across the south side of the property of the Gold Crown Motel, see id. at 67, which has been in existence since 1970, and that this line "would be sufficient to provide potable water service to the motel." Id. at AP411. We do not think that this evidence shows, as a matter of law, that Plaintiff did not have sufficiently proximate and adequate facilities to serve these customers or that it would be unable to provide adequate service within a reasonable period of time. To the contrary, we think this evidence at least establishes genuine issues of material fact as to whether Plaintiff's facilities were proximate and adequate to serve the disputed customers during the pre-1989 period.

With respect to the customers which Defendants began serving between May 5, 1989, and September 28, 1994, the record reveals the following:

(1) Cherokee Rock Addition: Plaintiff has a two-inch water line constructed in

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[10] For remand purposes, we point out that the United States District Court for the Northern District of Ohio recently held that, because § 1926(b) was not enacted to supply fire protection, a water association's capacity to provide fire protection is irrelevant to its entitlement to protection from competition under § 1926(b). See City of Sioux Ctr., 29 F. Supp.2d at 992-94; cf. Rural Water Dist. #3 v. Owasso Utils. Auth., 530 F. Supp. 818, 823 (N.D. Okla. 1979) (stating that § 1926(b) "was not enacted for the purpose[] of fire protection--it was enacted to provide means of securing a 'safe and adequate supply of running household water.'" (citation omitted)).

1970 which is approximately 200 feet from the development's connection to Defendants' water line. This line "would be sufficient to provide potable water service" but not to provide fire protection. Id. at AP411. Plaintiff also has a six-inch line constructed in 1982 which is approximately 1320 feet from the connection and "which is more than sufficient to meet all the water needs of the" development. Id. at AP66; see also id. at AP411 (stating that six-inch line could provide fire protection for a cost of approximately $7,000).

(2) FWCC Trucking:[11] Plaintiff has two-and-a-half-inch lines on the north and south sides of the property. See id. at AP411. Both lines were constructed in 1970. See id.

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[11] The record indicates that there are two separate FWCC properties, one of which Defendants began serving prior to 1994 and one of which it began serving after 1994. See Appellant's App., Vol. I, Doc. 5 at AP45 (referring to FWCC Trucking location number 820138, which Defendants began serving prior to 1994, and to FWCC Trucking location number 819929, which Defendants began serving after 1994). In any event, both properties have two-and-a-half-inch lines approximately 200 feet away. See id. at AP67, AP411.

(3) J.D. Hill (location number 820127): The record indicates that Plaintiff has a two-and-a-half-inch line approximately 200 feet to the west of this customer. See id. at AP67.

(4) Laster Realty Co.: Plaintiff has a two-and-a-half-inch line running across the west side of the property. See id. at AP68.

(5) Rasamy Mangboupha: Plaintiff has a two-and-a-half-inch line constructed in 1970 running approximately 400 feet south of this customer. See id. at AP68.

With respect to FWCC Trucking, J.D. Hill, Laster Realty Co., and Rasamy Mangboupha, the record indicates that Plaintiff's existing facilities could provide potable water service but not fire protection. See id. at AP411. However, fire protection could be obtained for these customers for approximately $50,000. See id. Like the evidence for the customers which Defendants began serving prior to May 5, 1989, this evidence is sufficient to establish genuine issues of material fact with respect to the proximity and adequacy of Plaintiff's facilities.

Finally, we think the evidence also precludes summary judgment on the customers which Defendants began serving after September 28, 1994. The record reveals the following as to these customers:

(1) Cherokee Rock Phase I: The record is unclear about Plaintiff's facilities with respect to this development. However, Plaintiff has alleged that the facilities for this area are the same as those for the Cherokee Rock Addition, described above, i.e., a two-inch water line approximately 200 feet from the development's connection to Defendants' water line and a six-inch line approximately 1320 feet from the connection.

(2) Food Plus/Dollar General Store: Plaintiff has a two-and-a-half-inch line constructed in 1970 running across the south side of this property. See id. at AP66.

(3) Bob Pruitt Property (John Bogner): Plaintiff has a two-and-a-half-inch line on the north side of the property and a two-and-a-half-inch line on the south of the property. See id. at AP 411. Both lines were constructed in 1970. See id.

(4) FWCC Trucking Office: Plaintiff has a two-and-a-half-inch line constructed in 1970 running approximately 400 feet to the south of this customer. See id. at AP67.

(5) OK Industries: Plaintiff has an eight-inch line constructed in 1982 approximately one mile to the east of this customer. See. id. at AP410. The record indicates that this line could be extended for approximately $50,000 to meet the customer's needs. See id.

(6) J.D. Hill Truckwash (location number 820166): Plaintiff has a two-and-a-half-inch line constructed in 1970 running about 400 feet to the south of this property. See id. at AP67.

(7) Doug Harvell: Plaintiff has a two-and-a-half-inch line running approximately 200 feet south of this customer. See id. at AP68.

Although Plaintiff's current facilities are sufficient for the customers' potable water needs, the record indicates that, for approximately $50,000, fire protection could be provided for the Food Plus/Dollar General Store, Bob Pruitt, FWCC Trucking, J.D. Hill Truckwash, and Doug Harvell properties. See id. at AP411. Plaintiff has presented sufficient evidence to withstand summary judgment with respect to whether its facilities were sufficiently proximate to these customers and with respect to whether it had the capacity to serve these customers within a reasonable time.[12]

In short, although additional clarifying proof may be needed to establish the exact distances between Plaintiff's lines and the disputed customers' properties, as well as Plaintiff's precise capacity to serve the disputed customers within a reasonable time, we conclude that Plaintiff has

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[12] Defendants argue that Plaintiff released its right to serve the Food Plus/Dollar General Store and the OK Industries customers and that it is now estopped to assert the right to serve these customers. See Appellee's Br. at 49. Because these issues were not considered by the district court and because the record is insufficient to address them, we leave these issues for the district court on remand.

established genuine issues of material fact with respect to whether it made service available to the customers. Indeed, the evidence indicating that Plaintiff's pipes ran across the property of certain customers is certainly sufficient to show that Plaintiff's facilities were proximate to those customers, and evidence showing longer distances between Plaintiff's pipes and the customers' properties clearly raises questions of fact on the issue of proximity. Viewing the evidence in a light most favorable to Plaintiff, we therefore conclude that summary judgment was improper on the issue of whether Plaintiff made service available for the two periods of time for which Plaintiff may seek relief under § 1926(b).

III.

In summary, because Plaintiff was indebted to the FmHA between April 14, 1969, and May 5, 1989, it is entitled to seek relief for Defendants' provision of service to the customers within Plaintiff's territory to which it establishes that it made service available. Although Plaintiff is not entitled to recover for any encroachments occurring or continuing between May 5, 1989, and September 28, 1994, because it was not indebted to the FmHA at the time, it may recover for encroachments occurring or continuing after September 28, 1994, the date on which it obtained another loan from the FmHA, so long as it establishes that it made service available to those customers. We also conclude that Plaintiff has established genuine issues of material fact regarding whether it made service available to the disputed customers for the encroachments occurring before 1989 and for those occurring or continuing after 1994. As noted above, evidentiary uncertainties should be resolved in favor of

Plaintiff, the party seeking to protect its territory, on remand.[13]

Accordingly, the district court's entry of summary judgment is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

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[13] We decline to address the additional arguments raised by Plaintiff in its Reply Brief because they were not presented to the district court and are not relevant to our disposition of this summary judgment appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed June 12, 1998]

No. 97-578-S

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,
Plaintiff,
v.

TOWN OF MULDROW, an Oklahoma town and the MULDROW PUBLIC WORKS AUTHORITY, a public trust,
Defendants.

ORDER

The following motions are before the court for its consideration: (1) Plaintiff Sequoyah County Rural Water District 7's motion for partial summary judgment, (2) Defendant Town of Muldrow's motion for partial summary judgment, and (3) Defendant Town of Muldrow's motion to dismiss state law claims. Plaintiff Sequoyah County Rural

Water District No. 7 ("Sequoyah-7") filed this action against Defendants Town of Muldrow and Muldrow Public Works Authority (collectively referred to as "Muldrow") seeking to enforce the provisions of 7 U.S.C. § 1926(b), which allows federally indebted rural water associations to service their territories free from the competition of municipalities. Sequoyah-7 claims Muldrow has violated § 1926(b) by selling water within Sequoyah-7's territory. Sequoyah-7 seeks to enforce the provisions of § 1926(b) by invoking the enforcement provisions of 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and 2202. Sequoyah-7 seeks declaratory and injunctive relief, as well as damages for Muldrow's past sales of water. The parties have fully briefed the issues necessary for the resolution of § 1926(b) liability.[1] Based on the foregoing reasons, the court finds the issues in favor of Muldrow and grants its motion for partial summary judgment. Sequoyah-7's motion for partial summary judgment is denied.[2]

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[1] This parties have submitted this matter for resolution on their respective briefs. At the pretrial conference, it was agreed that a trial on the issue of damages would be necessary only if the court held in favor of Sequoyah-7 on its § 1926(b) claims.

[2] Muldrow's motion to dismiss Sequoyah-7's state law claims is moot. In its motion to dismiss, Muldrow sought the dismissal of Counts 6, 7, and 8. By stipulation of dismissal dated February 23, 1998, the parties dismissed without prejudice Counts 4, 5, 6, and 7. Thus, the only remaining Count related to Muldrow's motion to dismiss is Count 8 - a request that the court declare all water lines and facilities constructed by Muldrow to serve residents within Sequoyah-7's territory be held in trust for the use and benefit of Sequoyah-7. Given the court's rejection of

BACKGROUND

Sequoyah-7 is an agency and legally constituted authority of the State of Oklahoma created for the purpose of developing and providing an adequate water supply to serve and meet the needs of rural residents within Sequoyah-7's territory. Muldrow owns and operates a water production plant and water distribution system within the Town of Muldrow. In March 1991, Sequoyah-7 was established as a public nonprofit rural water district. The history of Sequoyah-7, however, can be traced back to October 18, 1966, when the Board of County Commissioners of Sequoyah County, Oklahoma, declared certain lands to be incorporated and organized as Rural Water District No. 4, Sequoyah County, Oklahoma ("Sequoyah-4"). The area incorporated into Sequoyah-4 in 1966 included the areas which are now in dispute in the present controversy between Sequoyah-7 and Muldrow. In 1969, all assets and liabilities of Sequoyah-4 were assigned to the Rural Water Corporation ("RWC") and Sequoyah-4 was dissolved. RWC was formed as a nonprofit corporation, in part, to provide a waterworks and distribution for the and benefit of its rural system use water consumers. In March 1991, Sequoyah-7 was created and all assets and liabilities of RWC were transferred to Sequoyah-7.

Shortly after it was created in 1969, RWC began to borrow funds from the FmHA to construct certain water

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Sequoyah-7's legal arguments for a § 1926(b) violation, the attendant claim in Count 8 for a constructive trust has no merit. Thus, the court's ruling in favor of Muldrow on the motion for partial summary judgment related to the § 1926(b) claims likewise resolves Count 8 in favor of Muldrow.

system facilities. RWC would eventually become obligated to the Farmers Home Administration ("FmHA") on three notes - an April 14, 1969, note for $384,000, a June 9, 1970, note for $45,500, and a July 15, 1981, note for $388,000. In May 1989, RWC participated in a program enacted under the Agricultural Credit Act of 1987 whereby bond issuers such as RWC could buy back their government debt at a discounted rate. As a result, RWC borrowed funds from the National Bank for Cooperatives ("NBC") and purchased or paid off its outstanding indebtedness to the FmHA on May 5, 1989. All promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA." As part of the conversion process, RWC transferred to Sequoyah-7 its obligations to NBC. Sequoyah-7 remains indebted to NBC on the notes issued in favor of NBC. On September 28, 1994, Sequoyah-7 borrowed $331,400 from the FmHA to fund the construction of the "Redline" project and pump station. Sequoyah-7 remains indebted to the FmHA on the September 28, 1994, loan.

During the period of time RWC remained indebted to the FmHA April 14, 1969, to May 5, 1989 - Muldrow began selling water to customers within the territory claimed by Sequoyah-7 as its service area. Muldrow began selling to customers within the Gunter Ridge Addition and to The Gold Crown Motel f/k/a Diana Motel during this time period. After RWC paid off its loans on May 5, 1989, but before Sequoyah-7 became indebted to the Fm/HA on September 28, 1994, Muldrow began providing water service to the following customers claimed to be within Sequoyah-7's service area:

Cherokee Rock Addition

Lot 2, Diana Click location number 293684/293733

Lot 13, Michael Schroeder, location number 293667

Lot 14, Kevin Hauger, location number 293678

FWCC Trucking location number 820138

J.D. Hill, location number 820127

Laster Realty Co., location number 839861

Rasamy Mangboupha, location number 820149

Doug Harvell, location number 820182

After Sequoyah-7 became indebted to the FmHA on September 28, 1994, Muldrow added the following customers claimed to be within Sequoyah-7's service area:

Cherokee Rock Phase I

Lot 1, Robert Powell
Lot 3, Twila McElhaney
Lot 4, Denny Sossemen
Lot 5, Gary Carmen
Lot 6, Clinton Rice
Lot 7, Denise & Lee Boyers

Lot 8, Henry Davis
Lot 9, Dane Leathem
Lot 10, Anthony Bowers
Lot 11, Donna Marion
Lot 12, Dennis Shryrock

Food Plus/Dollar General Store, location number 816937

Bob Prewitt Property (John Bogner), location number 817806

FWCC Trucking office, location number 819929

OK Industries (a/k/a OK Foods), location number 816893

J.D. Hill Truckwash, location number 820166

With respect to all of these customers, it is Sequoyah-7's position that Muldrow has violated § 1926(b) because it has sold water within Sequoyah-7's established territory.

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 247-48 (1986). The moving party has the initial burden of demonstrating the absence of a genuine issue of fact. Celotex v. Catrett, 477 U.S. 317, 325 (1986). If this initial burden is satisfied, the nonmoving party then has the burden of coming forward with specific facts showing that there is a genuine issue for trial as to elements essential to the nonmoving party's case. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party cannot rest on the mere allegations of the pleadings, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which [it] carries the burden of proof." Applied Genetics v. First Affiliated Securities, 912 F.2d 1238, 1241 (10th Cir. 1990).

"A fact is 'material' only if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Thomas v. IBM, 48 F.3d 478, 486 (10th Cir. 1995) (quoting Anderson, 477 U.S. at 248). In this regard, the court examines the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party. Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). This court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. With these standards in mind, the court turns to the merits of parties' motions.

The central issue in this case is whether Muldrow has violated the statutory protections afforded Sequoyah-7 under

§ 1926(b) by selling water to consumers within Sequoyah-7's alleged territory.[3] Section 1926(b) is part of the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* ("the Act"). The Act authorizes the Secretary of Agriculture to make or insure loans to associations for a variety of reasons, including the "conservation, development, use, and control of water." 7 U.S.C. § 1926(a) (1). Section 1926(b) of the Act provides in pertinent part:

> [t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any

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[3] As a preliminary matter, the court's jurisdiction over this controversy must be addressed. The language of § 1926(b) does not contain an enforcement mechanism. Nor does § 1926(b) contain language creating a private right of action. Courts which have addressed § 1926(b) claims have, however, permitted suits to be brought pursuant to the authority of 42 U.S.C. § 1983 for enforcement of § 1926(b) rights. Wayne v. Village of Sebring, 36 F.3d 517, 528-29 (6th Cir. 1994), cert. denied, 514 U.S. 1127 (1995); Rural Water System #1 v. City of Sioux Center, 967 F.Supp. 1483, 1503-05 (N.D. Iowa 1997). Thus, § 1983 is the procedural mechanism allowing Sequoyah-7 to enforce federally protected rights created under § 1926(b). City of Sioux Center, 967 F.Supp. at 1503-05. Moreover, the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202, provides an alternative enforcement vehicle for rural water districts seeking relief under § 1926(b). Id. at 1506-07; Lexington-South Elkhorn .Water Dist. v. City of Wilmore, 93 F.3d 230, 232 (6th Cir. 1996).

> private franchise for similar service within such area during the term of such loan. . . .

Sequoyah-7 claims to be an association entitled to the protections of § 1926(b) and, further, that Muldrow's actions of annexing certain areas and providing service to consumers within those areas are violations of § 1926(b) entitling it to relief.

Section 1926(b) is understood as "unambiguously prohibit[ing] any curtailment or limitation of a FmHA-indebted water association's services resulting from municipal annexation or inclusion." City of Madison v. Bear Creek Water Assoc., 816 F.2d 1057, 1060 (5th Cir. 1987). Thus, § 1926(b) operates a means to "encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and Farmers Home Administration loans." Lexington South Elkhorn, 93 F.3d at 233. The language of § 1926(b) "indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means." Bear Creek Water Assoc., Inc., 816 F.2d at 1059.

In order for Sequoyah-7 to establish its entitlement to the protections afforded under § 1926(b), it must prove the following elements: (1) it is an "association" within the meaning of the Act; (2) it has a continuing indebtedness to the FmHA; and (3) Muldrow has encroached upon or invaded an area to which Sequoyah-7 has "made service available." Lexington-South Elkhorn, 93 F.3d at 234; Bell Arthur Water v. Greenville Utilities Com'n, 972 F.Supp. 951, 959 (E.D.

N.C. 1997). With respect to the first element, Muldrow does not contest Sequoyah-7's status as an "association." As a public nonprofit rural water district created for the purpose of developing and providing an adequate rural water supply, Sequoyah-7 clearly qualifies as an "association" under the Act.

Sequoyah-7 must next establish a continuing indebtedness to the FmHA. In assessing the extent of such indebtedness, Muldrow attempts to restrict Sequoyah-7's attachment to a debt obligation to the September 28, 1994, loan from the FmHA. Muldrow contends Sequoyah-7 cannot avail itself of any loan with the FmHA which predated Sequoyah-7's formation in March 1991. According to Muldrow, the 1969, 1970, and 1981 debt obligations between RWC and the FmHA are not to be considered when determining the extent of the continuing obligation between Sequoyah-7 and the FmHA. The court rejects Muldrow's argument. A review of the materials before the court reveals that Sequoyah-7 is a continuation of Sequoyah-4 and its successor, RWC. All three entities were established for the same purpose - to develop and provide an adequate rural water supply for residents of Sequoyah County, Oklahoma. Upon the formation of Sequoyah-7, all assets and liabilities of RWC became the assets and liabilities of Sequoyah-7. 82 O.S. § 1324.33. The statutes under which Sequoyah-7 was created specifically provide that corporations such as RWC, which were formed prior to December 1, 1988, "may organize and constitute a district subject to the provisions of the Rural Water, Sewer, Gas and Solid Waste Management Districts Act." 82 O.S. § 1324.31. The court concludes Sequoyah-7 is a continuation of the corporate entity RWC; therefore, Sequoyah-7 is entitled, for purposes of § 1926(b)

protection, to avail itself of the loans RWC made with the FmHA beginning in 1969.[4]

It is undisputed, however, that RWC's loans with the FmHA were paid off in 1989. As part of a Congressional effort to reduce the deficit, the Omnibus Budget Reconciliation Act of 1986 required the FmHA to sell some of its bonds and other obligations. Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc., 103 F.3d 38, 40 (6th Cir. 1996), cert. denied, 117 S.Ct. 2497 (1997). Under the Agriculture Credit Act of 1987, the Secretary of Agriculture was required to offer bond issuers such as RWC the option of buying back the debt obligations before the Secretary offered them to third parties. Id. On May 5, 1989, RWC took advantage of this buy out program and extinguished its debt to the FmHA by paying off its obligation at a discounted rate and refinancing through a loan with NBC. With respect to this buy out, Sequoyah-7's financial statements reflect that "[i]n 1989, these loans with outstanding balances of $655,766 were paid off in the discounted amount of $377,931, and were refinanced by a loan in the amount of $320,000 with National Bank for Cooperatives." The promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA" and the debt was no longer carried in the financial records of either RWC or Sequoyah-7.

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[4] Given this finding, the court need not address Muldrow's argument that Sequoyah-7 does not have § 1926(b) protection as a result of its September 28, 1994, loan because that loan was specifically directed to another project and it did not cover the areas in dispute. See Bell Arthur, 972 F.Supp. at 959-61.

Since the federal indebtedness was paid off on May 5, 1989, Muldrow contends the protections afforded under § 1926(b) were extinguished on that date inasmuch as the necessary element of a federal indebtedness is lacking. Sequoyah-7 objects to Muldrow's characterization of the May 5, 1989, buy out program and contends the notes were "sold" as opposed to "discharged" by the discounted pay out and refinancing. Sequoyah-7 contends this distinction is significant because a provision of the Agricultural Credit Act of 1987 (known as "subsection (g)") states that the curtailment prohibition of § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section." By arguing that it "purchased" the notes from the FmHA, Sequoyah-7 seeks to secure the benefit of the coverage provided by subsection (g) and retain its § 1926(b) protections.

The court rejects Sequoyah-7's argument. Subsection (g) has no application to an issuer such as RWC who cancels its debt to the FmHA and refinances the debt through another entity. Subsection (g) is intended for those situations where the FmHA sells a note or debt obligation to a third party. Under this later scenario, the protections of § 1926(b) should "follow the note" as the debt has not been extinguished, but rather, merely transferred to a third party via a sale by the FmHA. When the federal debt is extinguished by the issuer, however, there is no need to extend such protections. The rationale for this distinction has been stated as follows:

> When an issuer buys back its own bond and cancels the debt, however, it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to

> one of the main legislative purposes in enacting § 1926(b) - safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid.

Scioto Water, Inc., 103 F.3d at 42. Moreover, the fact that issuers receive a substantial money-saving incentive when paying off their debt to the FmHA supports the existence of a rational basis for extending protection only to obligations sold to third parties, and not to obligations purchased by debtors through the buy out program. Bell Arthur, 972 F.Supp. at 959. Thus, when RWC, Sequoyah-7's predecessor, took advantage of the FmHA buy out program and paid off its debt to the FmHA on May 5, 1989, the protections enjoyed by RWC under § 1926(b) were extinguished and no action taken by Muldrow prior to that time is actionable. See Scioto Water, Inc., 103 F.3d at 40-42; Bell Arthur, 972 F.Supp. at 957-59; City of Sioux Center, 967 F.Supp. at 1523.

The court must next address the protections available to Sequoyah-7 following the May 5, 1989, buy out. It is undisputed that neither RWC nor Sequoyah-7 became indebted to the FmHA between May 5, 1989, and September 28, 1994. Consequently, there is no § 1926(b) protection available to Sequoyah-7 during this time period as no federal indebtedness existed. On September 28, 1994, however, Sequoyah-7 became indebted to the FmHA. Thus, the court must evaluate whether Sequoyah-7's claims arising after

September 28, 1994, including the continuation of service by Muldrow in Sequoyah-7's protected area, are actionable.

In order to evaluate Sequoyah-7's claims in this respect, the court must turn to the third element for a § 1926(b) violation - whether Muldrow has encroached upon or invaded an area to which Sequoyah-7 has "made service available." Section 1926(b) does not define the term "made service available." One approach to defining this term is to determine whether the "association" has a state law duty to provide service to the area in question. See North Alamo Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910, 916 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996) (the existence of a state law duty to provide service "is the legal equivalent to"making service available under § 1926(b)); City of Sioux Center, 967 F.Supp. at 1530 (answer to question of whether a rural water district "had a legal right to serve depends entirely upon applicable state law.") Here, Sequoyah-7 cites to the Rural Water, Sewer, Gas and Solid Waste Management District Act, 82 O.S. §§ 1324.1-1324.35, §§ 1324.41-1324.50. The court has reviewed the provisions of this act and finds no duty or obligation on the part of Sequoyah-7 to provide water service. While rural water districts in Oklahoma are certainly formed in order to provide an adequate rural water supply to meet the needs of rural residents within the district's territory, state law does not mandate or require rural water districts to provide water service. Consequently, absent a legal obligation imposed under state law to provide water service to the area in question, the court must determine whether Sequoyah-7 has "made service available" under an alternative approach adopted by the federal courts which have addressed this issue.

An alternative test requires Sequoyah-7 to establish it has "made service available" by demonstrating its legal, authority to serve the disputed territory in combination with a physical ability to do so.[5] The latter part of this inquiry is commonly referred to as the "pipe-in-the-ground test." City of Sioux Center, 967 F.Supp. at 1525; Bell Arthur, 972 F.Supp. at 961; see also Lexington-South Elkhorn, 93 F.3d at 237. The key component of this test is the proximity of the facilities to the area to be served:

> [W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.

Lexington-South Elkhorn, 93 F.3d at 237. In addition to determining whether Sequoyah-7's physical structures - pipes in the ground - are present to serve the disputed territory, the

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[5] Because the court concludes Sequoyah-7 has failed to present sufficient evidence to establish that it has made service available to the disputed territory, the court need not decide whether Muldrow's activities constitute a curtailment of Sequoyah-7's service area. Moreover, the court need not address Muldrow's arguments related to its contention that Sequoyah-7 does not have the legal authority to service the disputed territory.

court also considers whether the structure has the physical ability or capacity to meet the consumers' needs and whether fiscal constraints placed on, or by, Sequoyah-7 impede its ability to service the area. See Bell Arthur, 972 F.Supp. at 962-63 (in determining that rural water district had not made service available, the court considered the capacity of the existing structure and the fact that the rural water district did not have funds available to build the necessary additional lines).

Sequoyah-7 does not contend it has provided water service to the disputed territory in the past. Nor does it contend that it is currently providing such service. Rather, Sequoyah-7's argument is that it "has the ability to provide water service and has made water service available to all of the customers in the dispute." Affidavit of Tommy Click at ¶ 21 (Plaintiff's Exhibit No. 1 to Plaintiff's Motion for Partial Summary Judgment). Sequoyah-7's evidentiary basis for this assertion is found in the affidavit of Tommy Click, Manager of Sequoyah-7. As to the disputed territory and corresponding consumers, Click provides the following details regarding Sequoyah-7's facilities:

> Cherokee Rock Addition - Sequoyah-7 has a 2" water line constructed in 1970 that is approximately 200 feet from the Addition's connection to the Muldrow line. If this line is not sufficient to meet all needs of the Addition, Sequoyah-7 has a 6" line constructed in 1982 approximately 1320 feet from the Addition's connection which is more than sufficient to meet all the water needs of the Addition.

Food Plus/Dollar Store - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs across the south side of this property to which the customer could connect.

FWCC Trucking Office - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs approximately 400 feet south of this property to which the customer could connect.

Gunter Ridge Addition - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs across the east side of the Addition and a 2" line on the west side of the Addition to which the customers could connect.

OK Industries - Sequoyah-7 has a water line that is approximately 1 mile east of the property to which the customer could connect.

The Gold Crown Motel f/k/a Diana Motel - Sequoyah-7 has a water line that is approximately 1 mile east of the property to which the customer could connect.

J.D. Hill Truckwash - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the west of the property to which the customer could connect.

J.D. Hill - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the south of the property to which the customer could connect.

> Doug Harvell - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the south of the property to which the customer could connect.
>
> Laster Realty Co. - Sequoyah-7 has a 2 ½" water line on the west side of the property to which the customer could connect.
>
> Rasamy Mangboupha - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs approximately 400 feet south of this property to which the customer could connect.

Based on this information, Sequoyah-7 contends it has satisfied the § 1926(b) requirement of having "made service available" to the disputed territory.[6] The court disagrees.

The mere fact that Sequoyah-7 has facilities near or within proximity to the areas and customers in question is insufficient. In Lexington-South Elkhorn, the Sixth Circuit rejected a similar argument. The distribution lines of the rural water district in Lexington-South Elkhorn were located fifty yards from one property and ranging from .1 to .4 miles from other properties. The Sixth Circuit, in affirming the district court's determination that the rural water district, Lexington-South Elkhorn, had not made service available,

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[6] Omitted from this list is any mention of Sequoyah-7's service facilities available with respect to the Bob Prewitt Property (John Bogner) and FWCC Trucking location No. 820138. Consequently, Sequoyah-7's § 1926(b) claim as to these two properties must fail due to the absence any proof that Sequoyah-7 has "made service available."

concluded that "[b]ased on the location of Lexington-South Elkhorn's distribution lines, it had not made service available prior to the time that [the municipality] began providing service to the disputed area." Id. at 237. Similarly, the distances of Sequoyah-7's water lines to the customers in question in this case, ranging from 200 feet to 1 mile, are not within sufficient proximity to establish that Sequoyah-7 has made service available to the disputed territory. Moreover, with respect to the Food Plus/Dollar General and OK Industries facilities, Sequoyah-7's 2 ½ inch water line is insufficient to service those customers' water needs. Without the capacity to deliver water in quantities sufficient, to service these customers, it cannot be said that Sequoyah-7 has made service available. Bell Arthur, 972 F.Supp. at 962-63. Finally, in considering Sequoyah-7's argument for finding that it has made service available based on the proximity of its facilities, the court places great weight on the fact that Sequoyah-7 admittedly would require customers "to pay the cost to connect their facilities to Sequoyah-7's distribution system as provided by state law." The fact that Sequoyah-7 would require consumers, who are already being adequately serviced by Muldrow, to pay for improvements to Sequoyah-7's distribution system militates against a proximity finding in

favor of Sequoyah-7.[7] Id. Consequently, the court finds Sequoyah-7 is not entitled to protection under § 1926(b).

CONCLUSION

The court finds Sequoyah-7 to be ineligible for § 1926(b) protection because it has failed to make service available to the disputed territory and customers. Thus, Sequoyah-7's motion for partial summary judgment is denied and Muldrow's motion for partial summary judgment is granted. Sequoyah-7's claims for § 1926 (b) protection brought pursuant to 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and 2202, and a constructive trust theory, are hereby dismissed. This action is therefore dismissed in its entirety.

IT IS SO ORDERED this 12th day of June, 1998.

/s/_____
Frank H. Seay
United States District Judge

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[7] The court likewise rejects Sequoyah-7's alternate solution to the proximity issue - supply proximity by converting Muldrow's water lines to Sequoyah-7's. Sequoyah-7 relies on North Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996), for this proposition. The court rejects this draconian remedy and finds it is not authorized by any legal authority. Sequoyah-7 has the affirmative obligation under section 1926(b) to make service available - it may not satisfy this obligation by riding the coattails of a municipality's constructive efforts to provide water service to consumers who would otherwise be without service.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed June 12, 1998]

No. 97-578-S

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,
Plaintiff,
v.

TOWN OF MULDROW, an Oklahoma town and the MULDROW PUBLIC WORKS AUTHORITY, a public trust,
Defendants.

JUDGMENT

Pursuant to the court's order entered simultaneously herein granting the motion for partial summary judgment filed by Defendants Town of Muldrow and the Muldrow Public Works Authority, judgment is entered in favor of Defendants and against Plaintiff Sequoyah-7 County Rural Water District

No. 7 on Plaintiff's claims brought under the authority of 7 U.S.C. § 1926(b).

Judgment is so entered this 12th day of June, 1998.

/s/_____
Frank H. Seay
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

[Filed September 28, 1999]

No. 98-7090

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the State of Oklahoma, *Plaintiff- Appellant,*	)
v.	)
TOWN OF MULDROW, an Oklahoma Town, and MULDROW PUBLIC WORKS AUTHORITY, a public trust, *Defendants - Appellees.*	)

ORDER

Before **PORFILIO, McKAY**, and **TACHA**, Circuit Judges.

Appellee's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of

the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/_____
Deputy Clerk